

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF HAWAII

In the Matter of the Application of	)	
	)	
HAWAII ELECTRIC LIGHT COMPANY, INC.	)	Docket No. 2017-0122
	)	
For Approval of a Power Purchase	)	
Agreement for Renewable Dispatchable	)	
Firm Energy and Capacity.	)	
_____	)	

LIFE OF THE LAND'S  
POST EVIDENTIARY HEARING BRIEF  
&  
CERTIFICATE OF SERVICE

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**In the Maui Electric**, SCOT-21-0000041 (2022) (“MECO-Paeahu”)

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**County of Maui, Hawaii v. Hawaii Wildlife Fund et al.** 140 S. Ct. 1462; 206 L. Ed. 2d 640 (2020)

### **ABBREVIATIONS & ACCRONYMS**

<b>A&amp;R PPA</b>	<b>Amended and Restated Power Purchase Agreement</b>
<b>CO<sub>2</sub>e</b>	<b>Carbon Dioxide Equivalent</b>
<b>Commission</b>	<b>Public Utilities Commission</b>
<b>DCA</b>	<b>Division of Consumer Advocacy (Consumer Advocate)</b>
<b>DLNR</b>	<b>Department of Land and Natural Resources</b>
<b>GHG</b>	<b>Greenhouse Gas</b>
<b>HECO</b>	<b>Hawai'i Electric Company</b>
<b>HELCO</b>	<b>Hawai'i Electric Light Company</b>
<b>HELCO I</b>	<b>In re HELCO decision filed May 10, 2019, SCOT-17-0000630</b>
<b>HELCO II</b>	<b>In re HELCO decision filed May 24, 2021, SCOT-20-0000569</b>
<b>HELCO III</b>	<b>In re HELCO decision filed Feb 4, 2022, SCOT-22-0000024</b>
<b>HRS</b>	<b>Hawaii Revised Statutes</b>
<b>Hu Honua</b>	<b>Hu Honua BioEnergy LLC</b>
<b>IR</b>	<b>Information Request</b>
<b>LOL</b>	<b>Life of the Land</b>
<b>LOTL</b>	<b>Life of the Land</b>
<b>MRV</b>	<b>GHG Monitoring, Reporting and Verification</b>
<b>MW</b>	<b>Megawatt</b>
<b>MWh</b>	<b>Megawatt-hour</b>
<b>PGV</b>	<b>Puna Geothermal Venture</b>
<b>PM 2.5</b>	<b>Particulate Matter with a diameter of 2.5 microns or less</b>
<b>PM10</b>	<b>Particulate Matter with a diameter of 10 microns or less</b>
<b>PPA</b>	<b>Power Purchase Agreement</b>
<b>PUC</b>	<b>Public Utilities Commission</b>
<b>RDG-PPAs</b>	<b>Renewable Dispatchable Generation Power Purchase Agreement</b>
<b>RFP</b>	<b>Request for Proposal</b>
<b>SIR</b>	<b>Supplemental Information Request</b>
<b>SOI</b>	<b>Statement of Issues</b>

## **I. INTRODUCTION**

The long and litigious history of the Hu Honua project is characterized by the competing interests of a mysterious and powerful corporate entity and those of the ratepayers and people of Hawai‘i. On one hand, Hu Honua is seeking to force through the approval of an expensive power-purchase agreement (“PPA”) for a 19th century-era wood-burning technology that will deplete and pollute Hawai‘i’s natural resources and increase the cost of electricity for the people of Hawai‘i Island, all in the name of corporate profits. On the other hand, the HELCO ratepayers and the public interest of the people of Hawai‘i are being protected by a robust framework of environmental laws and the reasoned analysis of the Hawai‘i Public Utilities Commission. As Hawai‘i (and the world) confront the escalating climate emergency, these laws, and the agencies and entities that wield them, represent the main arbiter tasked with balancing the complex and oft competing needs that constitute the “public interest.” Frequently, the public interest goal to strive towards equity and provide low-cost electricity conflicts with the public interest imperative of averting catastrophic climate change through the transition to clean, renewable, and socially and environmentally responsible energy. Here, however, that conflict is not present: the proposed Project contemplates burning trees (our number one ally in the fight against climate change), emits more greenhouse gases than comparable fossil fuel facilities, and raises electricity prices for ratepayers. The choice is clear. As will be discussed in the following pages, there exists numerous reasons, indeed imperatives, for the Commission to reject the Hu Honua A&R PPA.

## II. SUMMARY OF PROCEDURAL HISTORY

### Procedural History

Hu Honua proposed a biomass project to HELCO in 2008. HELCO filed a Waiver from Competitive Bidding in 2008, docket no. 2008-0143, which was approved by the Commission on Nov 14, 2008.<sup>1</sup> HELCO filed a Power Purchase Agreement with the Commission in 2012.<sup>2</sup> Life of the Land and Tawhiri Power were admitted as participants. The Commission approved the PPA on Dec 20, 2013. Hu Honua missed deadlines. HELCO cancelled the contract on March 1, 2016. Hu Honua filed a federal lawsuit against HELCO and others.<sup>3</sup> Settlement discussions ensued, resulting in a confidential “conditional settlement” between Plaintiff Hu Honua and Defendants HEI, HECO, and HELCO in May 2017. HELCO’s attorneys explained the “conditional settlement” as follows:

As previously disclosed, Hu Honua Bioenergy, LLC entered into a confidential settlement agreement with Hawaiian Electric Industries, Inc., Hawaiian Electric Company, Inc., and Hawaii Electric Light Company, Inc. (collectively “Hawaiian Electric Entities”). Pursuant to terms of that settlement, Hu Honua and Hawaii Electric Light Company, Inc. entered onto an Amended

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<sup>1</sup> Docket Number 2008-0143

<sup>2</sup> Docket Number 2012-0212

<sup>3</sup> The Commission may take judicial notice of the publicly filed documents in the federal lawsuit captioned Hu Honua Bioenergy, LLC vs Hawaiian Electric Industries, Inc., Hawaiian Electric Company, Inc.; Hawaii Electric Light Company, Inc.; NextEra Energy, Inc.; and Hamakua Energy Partners, L.P., Case No. 1:16-cv-00634-JMS-KJM, in the United States District Court for the District of Hawaii. HRS § 269-10; In re 'Iao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Hawaii 228, 255, 287 P.3d 129, 156 (2012) (applying Rule 201 of the Hawai'i Rules of Evidence to the PUC, but limiting “the scope of judicial notice to facts ‘not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court, or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.’”); Roxas v. Marcos, 89 Hawaii 91, 111, 969 P.2d 1209, 1229 (1998) (taking judicial notice of the records and files of related cases, and noting that “[c]ourts have generally recognized that they may, in appropriate circumstances, take notice of proceedings in other courts, both within and without their judicial system [,] if those proceedings have a direct relation to the matter at issue.”). The citations to the Hu Honua federal lawsuit reference the “PACER” federal court electronic filing system.

and Restated Power Purchase Agreement (“AR-PPA”), which was subject to approval by the Public Utilities Commission (“Commission”). The settlement is conditioned upon timely, final and non-appealable approval of the AR-PPA by the Commission.<sup>4</sup>

The Commission approved the A&R PPA on July 28, 2017. Life of the Land appealed. The Hawai‘i Supreme Court upheld the appeal on May 10, 2019 (*HELCO I*). On June 20, 2019, the Commission issued Order No. 36382 reopening the docket. The Commission subsequently rejected the Waiver from Competitive Bidding on July 9, 2020. Hu Honua appealed. The Hawai‘i Supreme Court upheld the appeal on May 24, 2021 (*HELCO II*). The Commission reopened the proceeding and revised the statement of issues on June 20, 2021. Hu Honua filed an appeal that sought to indefinitely block the evidentiary hearing. The Hawai‘i Supreme Court dismissed the appeal on Feb. 4, 2022 (*HECO III*).

### **Parties and Participants**

Life of the Land (also “LOL”) is a Hawai‘i non-profit public interest organization founded in February 1970. LOL asserts that every energy project has positive and negative economic, environmental, social, cultural, geographic, greenhouse gas, taxpayer, and ratepayer impacts. LOL is concerned with the impacts, externalities, cumulative impacts, and unintended side-effects of energy projects and programs.

Hawai‘i Electric Light Company, Inc. (“HELCO”) is a regulated utility and is a subsidiary of another regulatory utility named Hawai‘i Electric Company, Inc. (“HECO”), which in turn is a subsidiary of the unregulated Hawai‘i Electric Industries, Inc. (“HEI”) holding company.

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<sup>4</sup> Case 1:16-cv-00634-JMS-KJM, Document 170, Filed 07/02/18. PageID#:5353.

Hu Honua BioEnergy, LLC (“Hu Honua”) is not a utility and therefore is not regulated by the Public Utilities Commission. Hu Honua did not file a motion to participate or intervene in the proceeding. The Commission named Hu Honua as a necessary party to this proceeding.<sup>5</sup>

Tawhiri Power is a Qualified Facility that has a Power Purchase Agreement with HELCO and is contractually obligated to provide HELCO with wind energy.

The Consumer Advocate represents, protects, and advances the interests of all consumers of utility services, including individuals and businesses. The consumer advocate has the full rights to participate as a party of interest in all proceedings before the Public Utilities Commission.

### **III. STATEMENT OF ISSUES**

In *HELCO II*, the Supreme Court remanded the case to the PUC, emphasizing that “the parties are fixed in the same position they were in following *HELCO I*,” and instructing that the PUC’s post-remand hearing:

must afford LOL an opportunity to meaningfully address the impacts of approving the Amended PPA on LOL’s members’ right to a clean and healthful environment, as defined by HRS Chapter 269. The hearing must also include express consideration of GHG emissions that would result from approving the Amended PPA, whether the cost of energy under the Amended PPA is reasonable in light of the potential GHG emissions, and whether the terms of the Amended PPA are prudent and in the public interest, in light of its potential hidden and long-term consequences.<sup>6</sup>

On remand, the PUC provided the following “Statement of Issues”:

- 1) What are the long-term environmental and public health costs of reliance on energy produced at the proposed facility?
  - a) What is the potential for increased air pollution due to GHG emissions directly attributed to the Project, as well as from earlier stages in the production process?

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<sup>5</sup> Order No. 34554 at 11-12, filed May 17, 2017

<sup>6</sup> 149 Haw. 239, 242.



- 2) What are the GHG emissions that would result from approving the Amended PPA?
- 3) Whether the cost of energy under the Amended PPA is reasonable in light of the potential for GHG emissions.
- 4) Whether the terms of the Amended PPA are prudent and in the public interest, in light of the Amended PPA's hidden and long-term consequences.<sup>7</sup>

Because PUC issues 2, 3, and 4 are taken verbatim from the second sentence of the above quote from *HELCO II*, it is reasonable to assume that PUC issues 1 and 1(a) are intended to “afford LOL an opportunity to meaningfully address the impacts of approving the Amended PPA on LOL’s members’ right to a clean and healthful environment, as defined by HRS Chapter 269.”

With the exception of issues related to water use and the proposed Hu Honua injection wells, the PUC allowed testimony and documentary evidence at the post-remand hearing addressing, in varying degrees, the full range of significant foreseeable impacts of approving the Amended PPA on LOL’s members’ right to a clean and healthful environment. All of these issues, as well as subsidiary and related issues, will be addressed in LOL’s Post-Evidentiary Hearing Brief.

#### **IV. BURDEN OF PRODUCING EVIDENCE AND BURDEN OF PROOF**

As a threshold matter, it is important to note that HELCO has both the burden of producing evidence and the burden of persuasion based on a preponderance of the evidence standard:

Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.<sup>8</sup>

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<sup>7</sup> Order No. 37852 at 7-8, filed June 30, 2021

<sup>8</sup> ORDER NO. 33795 at 38, docket no 2015-0022, filed 7-15-2016 quoting *HRS* § 91-10(5)

Hu Honua has the burden of proof regarding its claim of entitlement to preferential rates. Hu Honua has failed to meet both its burden of producing evidence and its burden of proof with respect to preferential rates.

Importantly, excluding preferential rates, HELCO's burdens apply to each of the constituent criteria the PUC must evaluate in connection with this proceeding. For reasons explained in greater detail below, HELCO has failed to meet both its burden of producing evidence and its burden of proof with respect to multiple essential issues before this Commission.

#### **V. HELCO'S SUPPORT FOR THE A&R PPA IS HIGHLY SUSPECT**

The long and litigious history leading up to HELCO's current purported support for the PPA raises serious questions about whether this project is in the public interest or the interest of HELCO's ratepayers. Following HELCO's termination of the original Hu Honua PPA in 2016, Hu Honua filed a lawsuit in federal court seeking over a billion dollars in damages from HELCO. Hu Honua's lawsuit, which named HEI, HECO, HELCO, NextEra Energy, and Hamakua Energy Partners as defendants, alleges a "succession of anticompetitive events" arising out of a merger agreement between NextEra Energy and HECO.<sup>9</sup> Hu Honua's Second Amended Complaint, filed on January 29, 2018, asserts claims against HELCO for anti-trust violations, breach of contract, promissory estoppel, breach of the covenant of good faith and fair dealing, breach of fiduciary duty, and unfair competition in violation of HRS Chapter 480.<sup>10</sup> Hu Honua

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<sup>9</sup> Case 1:16-cv-00634-JMS-KJM, Document 138, Filed 01/29/18, PageID#:2417.

<sup>10</sup> Id., PageID#: 2529 et seq.

seeks damages from HELCO “in no event less than \$555 million, which must be trebled under Haw. Rev. Stat. 480-13(a)(1), plus reasonable attorney’s fees and costs of suit.”<sup>11</sup>

As a result of a confidential “conditional settlement” between Hu Honua and HELCO, the details of which have never been disclosed to the Commission,<sup>12</sup> Hu Honua agreed to stay the federal action while HELCO sought approval of an amended PPA that resulted from the confidential conditional settlement, which actually increased the contractual term from 20 years to 30 years. In a status report filed in the federal lawsuit on July 2, 2018, Hu Honua stated that “[b]oth Hu Honua and the HEI Defendants remain firmly committed to ensuring that their

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<sup>11</sup> Id., PageID#: 2551.

<sup>12</sup> Life of the Land submitted Information Requests to HELCO and Hu Honua requesting "a copy of the Settlement Agreement and all supporting documents which led to to 2017 PPA" filed Oct. 28, 2019. "Hawai'i Electric Light objects to this request to the extent that it is overly broad, unduly burdensome, not reasonably calculated to lead to the discovery of admissible evidence, and seeks information that is privileged, outside the scope of LOL's participation in this docket and not relevant to the subject matter of this docket." HELCO Response to LOL/HELCO-IR-58, filed Nov. 19, 2019. "Hu Honua objects to this information request to the extent that it is irrelevant to the issues in this proceeding, immaterial, unduly burdensome, vague and ambiguous, onerous, repetitious, unintelligible, argumentative, utilizes terms that have multiple interpretations but are not properly defined or explained, privileged, and/or subject to protection." Hu Honua Response to LOL/HHB-IR-62 filed Dec. 9, 2019.

“On December 1, 2016, Hu Honua filed federal civil action against HELCO. The Amended PPA is apparently result of the Parties' settlement discussions in the Hu Honua lawsuit. According to HELCO, on June 20, 2017, the Parties reached settlement agreement in Hu Honua's lawsuit against HELCO, which required the Parties to submit the Amended PPA to the Commission for review and approval.” ORDER NO. 37205, fn 25 at 8, filed July 9, 2020.

Tawhiri submitted Information Requests to HELCO and Hu Honua regarding Civil Complaint No. 16-00634, filed Oct. 7, 2021. "Hawaii Electric Light objects to this information request to the extent that it calls for the disclosure of information regarding the terms of a settlement agreement which includes a confidentiality provision." HELCO Response to TAWHIRI-HELCO-IR-24 filed October 21, 2021. "Hu Honua objects to this information request as overbroad and unduly burdensome to the extent that it seeks information and/or documents that are not relevant to and outside of the scope of the issues in this remand proceeding." Hu Honua Response to TAWHIRI-HU HONUA-IR-65 filed October 21, 2021

settlement secures final, non-appealable Public Utilities Commission (“PUC”) approval.”<sup>13</sup> The status report filed by HEI, HECO, and HELCO on the same date, while *HELCO I* was pending before the Supreme Court, included a summary of “possible outcomes”:

- (1) The Hawaii Supreme Court affirms the decisions of the Commission. In this scenario, the AR-PPA would be binding and the settlement agreement would also be binding;
- (2) The Hawaii Supreme Court finds that the Commission erred and remands the decision for further proceedings. The Commission will likely allow full participation by LOL and hold hearing on the carbon dioxide emissions to satisfy any obligations that may exist under Section 269-6(b) of the Hawaii Revised Statutes. There are two possible outcomes following such hearings: (a) the Commission could deny the approval, in which case the settlement is null and void and we are back in litigation; or (b) if the Commission approves the AR-PPA again, that decision would be subject to appeal again. If no appeal were filed, the AR-PPA would be in effect and the settlement agreement would be binding. If there was an appeal, then the parties would be in the same position we are in now and await an outcome on that appeal.<sup>14</sup>

In short, the confidential conditional settlement of Hu Honua’s federal lawsuit against HEI, HECO and HELCO raises extremely troubling questions about whether and to what extent these utilities agreed that HELCO would support the amended PPA in order to limit or avoid damages that could total well over a billion dollars. For reasons explained in this submission, the record presented to the Commission by HELCO and Hu Honua falls woefully short of demonstrating that HELCO (or Hu Honua) performed the kind of data-driven, thorough and careful analysis necessary to determine that the A&R PPA is in the interest of the ratepayers and the public. Instead, the incomplete and obscure record before the Commission suggests that HELCO may have agreed to support the A&R PPA primarily to protect the shareholders of HEI

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<sup>13</sup> Id., Document 169, Filed 07/02/18. PageID#: 5351.

<sup>14</sup> Id., Document 170, PageID#: 5354.

against the risk of an enormous damages award in the federal lawsuit and/or the massive costs associated with defending such a claim.

This is an issue that was raised by Tawhiri Power in their prehearing statement of position: Is HELCO advocating for the public interest and interest of its ratepayers or is it protecting itself from additional litigation by Hu Honua at the expense of the public and its ratepayers?<sup>15</sup> This question is brought into stark contrast when one compares HELCO's current support for the A&R PPA with its 2017 statement in response to Hu Honua's federal lawsuit: "Hu Honua now estimates the project cost has more than doubled to over \$200 million as a result of its own mistakes, which it now apparently expects Hawaii Electric Light's customers to pay."<sup>16</sup>

Due to limitations on time and staffing, the PUC and DCA frequently must rely on the utility that is seeking approval of a PPA to conduct much of the due diligence and analysis related to the proposed project. After all, the utility (with its army of attorneys and analysts) is the entity that worked directly with the project developer to identify the terms and conditions of the PPA and evaluate whether the project makes sense in the context of the utility's needs and obligations. With limited auditing and direct inquiry, the Commission must rely on the good faith representations of the utility that is seeking approval of the PPA to evaluate whether the project is reasonable, prudent, and in the public interest.

Life of the land submits that, under the circumstances, it would be inappropriate for the Commission to approve the A&R PPA based on a record that does not provide any way for the Commission to know the extent to which the costs to be charged to ratepayers under the A&R

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<sup>15</sup> Tawhiri Power LLC's Prehearing Statement of Position at 3-4, filed Dec. 21, 2021.

<sup>16</sup> [www.hawaiitribune-herald.com/2017/05/25/Hawaii-news/helco-hu-honua-settlefederal-lawsuit](http://www.hawaiitribune-herald.com/2017/05/25/Hawaii-news/helco-hu-honua-settlefederal-lawsuit)

PPA represent consideration to settle Hu Honua's claims against HEI, HECO, and HELCO for their allegedly unlawful conduct that took place in 2015 and 2016.

## **VI. HU HONUA'S AND HELCO'S LACK OF TRANSPARENCY PRECLUDES AN INFORMED REVIEW OF THE A&R PPA AND REQUIRES THAT IT BE DENIED**

The confidentiality of the conditional settlement of the federal lawsuit is only one example of the many ways in which Hu Honua and HELCO have failed to meet their burden to develop a full and appropriate record in this docket. As the Commission evaluates the A&R PPA, including the many concerning issues raised throughout the proceeding and in this brief, it must consider this troubling context in which the A&R PPA is being presented, the potential self-serving motivations of the parties, as well as the lack of transparency that has hung over the proceedings.

In an unprecedented show of corporate opacity, Hu Honua has refused to disclose the identities of its investors, corporate partners, or affiliates to the Commission or the people of Hawai'i. Despite this obfuscation, Hu Honua is seeking Commission approval for a project that relies on a dizzyingly complex web of affiliates, subsidiaries, and contracting partners for everything from sourcing the trees it intends to burn as fuel to the GHG compliance procedures that it will use to verify its emissions and sequestration efforts. At every step of the way, Hu Honua claims that it cannot provide specific details regarding critical aspects of the project's implementation and compliance plan until after the Commission has approved the A&R PPA. Such uncertainty as to the Project's projected impacts, as well as the uncertainty and complexity involved in creating an enforceable compliance plan, prevent the Commission from adequately evaluating the Project and preclude the approval of the A&R PPA.

There are numerous examples of Hu Honua's outright refusal to provide critical information to Life of the Land prior to Life of the Land's last ability to file testimony and

exhibits. This included basic information on biodiversity and forest impacts of chopping down trees,<sup>17</sup> air emissions other than GHGs,<sup>18</sup> light pollution,<sup>19</sup> noise,<sup>20</sup> injection wells and related ocean impacts,<sup>21</sup> and virtually everything involving carbon sequestration (emissions and offsets).

Throughout the proceedings, Hu Honua responded to numerous Commission requests with the caveat that it was objecting to providing an answer “to the extent it seeks information not relevant to the scope of the issues in this remanded proceeding.” The Commission’s Information Requests filed on October 29, 2021 sought information regarding permits by other agencies,<sup>22</sup> traffic and noise,<sup>23</sup> underground injection wells,<sup>24</sup> and non-GHG emissions.<sup>25</sup> In subsequent, information requests, filed on December 1, 2021, the Commission sought information on local health impacts of biomass combustion,<sup>26</sup> using excess heat from the Hu Honua facility for industrial applications,<sup>27</sup> correspondence between Hu Honua or any of its affiliates and plantation landowners,<sup>28</sup> fuel supplier’s forest management plans,<sup>29</sup> biomass

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<sup>17</sup> Hu Honua Response to LOL/HHB-SIR-52(a), filed January 6, 2020

<sup>18</sup> Hu Honua Responses to LOL/HHB-IR-90, 91, filed December 9, 2019, LOL/HHB-SIR-45 filed, January 6, 2020, LOL/HHB-IR-271 through 291, filed March 6, 2020

<sup>19</sup> Hu Honua Response to LOL-IR2021-44, filed July 26, 2021

<sup>20</sup> Hu Honua Responses to LOL/HHB-IR-67 filed December 9, 2019, LOL-IR-2021-4, filed July 26, 2021

<sup>21</sup> Hu Honua Responses to LOL-IR-76, 78 filed July 7, 2017, Hu Honua responses to SIR-43 and -53, filed January 6, 2020, Hu Honua response to LOLZHHB-IR-256, filed March 6, 2020, LOL-IR-2021-49, filed July 12, 2021; LOL-IR-2021-8 and 36, filed July 26, 2021

<sup>22</sup> Hu Honua Response to PUC-Hu Honua-IR-13, filed on October 29, 2021

<sup>23</sup> Hu Honua Response to PUC-Hu Honua-IR-27(d), filed on October 29, 2021

<sup>24</sup> Hu Honua Response to PUC-Hu Honua-IR-39, filed on October 29, 2021

<sup>25</sup> Hu Honua Response to PUC-Hu Honua-IR-40, filed on October 29, 2021

<sup>26</sup> Hu Honua Response to PUC-Hu Honua-IR-45, filed on December 1, 2021

<sup>27</sup> Hu Honua Response to PUC-Hu Honua-IR-50, filed on December 1, 2021

<sup>28</sup> Hu Honua Responses to PUC-Hu Honua-IR-53, 54, filed on December 1, 2021

<sup>29</sup> Hu Honua Response to PUC-Hu Honua-IR-58, filed on December 1, 2021

surveys for proposed planted trees,<sup>30</sup> and preferential agriculture terms.<sup>31</sup> Hu Honua's responses to these requests were often evasive or incomplete, and none of Hu Honua's answers included reports, studies, or other relevant documentation or data.

HELCO also has declined to provide critically important information that it should have compiled and analyzed in its own "independent" evaluation of the A&R PPA. Assuming that HELCO does not have this information, it appears that: HELCO has not examined the legal relationship between Hu Honua and any affiliates it may have; has not tracked the cost for each stage of development for the Hu Honua power plant; did not analyze, study, examine, or visit Hu Honua's proposed logging sites and planting sites; did not examine baseline environmental conditions or review future environmental impacts regarding planned injection wells, ocean condition, air emissions (other than GHG); did not review needed discretionary and non-discretionary permits; and did not review Hu Honua's GHG data inputs.<sup>32</sup>

Furthermore, neither Hu Honua nor HELCO submitted any engineering studies, injection well reports, geological studies, or other relevant documentation that analyzes the injection well process or the associated impacts.

It bears reiteration that HELCO and Hu Honua have the burden of producing evidence to support the A&R PPA, which is an indispensable predicate to satisfaction of their burdens of proof.

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<sup>30</sup> Hu Honua Response to PUC-Hu Honua-IR-60, filed on December 1, 2021

<sup>31</sup> Hu Honua Response to PUC-Hu Honua-IR-64, filed on December 1, 2021

<sup>32</sup> HELCO Responses to LOL filed October 21, 2021



## **VII. THE PROJECT IS UNNECESSARY, COUNTERPRODUCTIVE, AND CONTRARY TO THE PUBLIC INTEREST**

### **A. “Adequacy of Supply” Requirements Have Already Been Met**

Recent Adequacy of Supply Reports from HELCO establish that Hawai‘i Island has more than an adequate supply of energy capacity through at least 2037, obviating the need for additional capacity that would be supplied by Hu Honua. As such, the approval of the Hu Honua PPA would unnecessarily burden HELCO ratepayers with the costs of superfluous energy, capacity, and grid services.

Tawhiri raised this issue in its Prehearing Statement of Position:

There are questions concerning whether the energy and capacity from Hu Honua is even needed. Recent Adequacy of Supply Reports do not support the need for Hu Honua’s capacity and HELCO has admitted that they are not projecting an increase in load. Indeed, HELCO’s Sales Forecast shows that its sales will decrease for the years 2021-2037; for some years, the sales forecast is down by approximately 5%. Thus, HELCO ratepayers may be forced to pay for excess energy, capacity, and grid services if the Hu Honua Amended PPA is approved.”<sup>33</sup>

This same issue was addressed by the Commission in its “findings and conclusions” reached in Order No. 37205, denying HELCO’s Waiver for Competitive Bidding on July 9, 2020.<sup>34</sup> Based on the record then before it, the Commission made the following findings and

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<sup>33</sup> Tawhiri Power LLC's Prehearing Statement of Position at 12.

<sup>34</sup> In vacating Order No. 37205 on appeal, the Hawai‘i Supreme Court stated that the Commission incorrectly tied their decision to HELCO I. However, the court explicitly stated, in footnote #3, that “[w]e express no opinion as to the PUC’s discretion, if any, to address the 2017 waiver; we merely hold that HELCO I and its remand instructions did not affect the waiver.” 149 Haw. At 242. In his concurring opinion, Justice Wilson wrote that “I concur that our decision in HELCO I does not preclude the PUC from exercising its duty to determine under Part II.A.3.d of the PUC’s Competitive Bidding Framework whether a waiver should be granted to HELCO.” Id., at 243. Life of the Land reserves its position that the Commission should rescind the 2017 waiver from competitive bidding.

conclusions, which continue to be supported by the record before the Commission in the current docket:

1. The competitive bidding process conducted in the RFP proceeding, Docket No. 2017-0352, in parallel with this proceeding has resulted in the approval, to date, of six renewable energy PPAs of comparable size to the Hu Honua Project, including two on Hawaii Island, which offer similar benefits in terms of renewable energy and grid services and which are priced significantly lower than the Hu Honua Project.
2. A second phase of the RFP process is currently underway and has yielded the HECO Companies' selection of an additional sixteen bids for renewable energy projects, including three on Hawaii Island.

In a footnote to finding/conclusion #2, the Commission noted that:

[t]wo of these three bids are for solar-plus-storage projects, each of which is expected to provide 60 MW of renewable energy and is paired with up to 240 MWh of energy storage. The third bid is for a standalone energy storage project of 12 MW.<sup>35</sup> In its Order No. 37205, the Commission addressed "Recent Developments."<sup>36</sup>

HECO submitted seven competitively bid PPAs for grid-scale, solar-plus-storage projects on the islands of Oahu, Maui, and Hawai'i on December 31, 2018. These renewable dispatchable generation PPAs featured contractual provisions that represented significant improvements over previous renewable energy PPAs, including pricing ranging between \$0.08/kWh to \$0.12/kWh. The fixed pricing eliminated undesirable contractual provisions, such as seniority curtailment, evergreen renewal, and risk-adjusted pricing. The RDG-PPAs, with their firm dispatchability, provide increased reliability and grid stability, as well as the operational flexibility to allow the utility to best meet grid needs. The Commission explained:

In addition, in Docket No. 2017-0352, the Hawaiian Electric Companies have recently completed their second round of competitively bid RFPs for RDG-PPAs, which have resulted in the

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<sup>35</sup> Docket No. 2017-0122, Order No. 37205, at 20-21.

<sup>36</sup> Order No. 37205 at 20-23, filed July 9, 2020

selection of sixteen new solar-plus-storage or stand-alone storage projects for PPA negotiations, including three new projects on Hawaii Island (Keahole Battery Energy Storage, Puako Solar PV Battery Storage, and Waikoloa Village Solar Storage). These RDG-PPA projects have transformed the renewable energy procurement market in Hawaii by demonstrating that competitive bidding can result in PPAs that provide firm, dispatchable renewable energy and ancillary grid services at increasingly lower prices. Pertinently, the approved RDG-PPA projects for Hawaii Island, AES Waikoloa Solar, LLC (Docket No. 2018-0430) and Hale Kuawehi Solar LLC (Docket No. 2018-0432) are 30 MW in size, which is slightly larger than the 21.5 MW for the Hu Honua Project, and, at \$0.08/kWh and \$0.09/kWh, respectively, are significantly less expensive than the Hu Honua Project's estimated pricing of \$0.221/kWh.<sup>37</sup>

The Commission also concluded that there is nothing unique about electrical generation from biomass fuels that makes it preferable to other sources of renewable energy:

3. Nothing in HRS 269-27.2 or 269-92, et seq., distinguishes or prioritizes energy produced from biomass resources, versus solar, wind, or other sources of renewable energy, and the underlying goals and policies of promoting and facilitating greater amounts of renewable energy appear to be equally served by the RDG-PPA projects as by the Hu Honua Project.<sup>38</sup>

Even assuming, *arguendo*, that Hu Honua is entitled to a waiver from competitive bidding, there is no question that the A&R PPA must be evaluated within the context of available alternative projects. In this regard, the Commission acknowledged that, “as discussed above, the initiation of Docket No. 2017-0352 and the resulting RDG-PPAs have produced real alternatives against which to evaluate the benefits and costs of the Hu Honua Project.”<sup>39</sup> The Hu Honua project simply cannot withstand a comparison with the many alternatives that are becoming increasingly available.

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<sup>37</sup> Order No. 37205 at 22-23, filed July 9, 2020

<sup>38</sup> Order No. 37205 at 21, filed June 9, 2020.

<sup>39</sup> Order No. 37205 at 27, filed July 9, 2020

**B. HELCO Has Exceeded the RPS Mandate and Therefore the Project Must Reduce Costs for Ratepayers**

Pursuant to two decisions issued by the Commission in 2013, newly proposed generation projects must “demonstrate that the project provides cost reduction benefits to ratepayers, directly or indirectly, by improving and maximizing the integration of additional lower cost renewable energy,” particularly when the utility’s RPS exceeds its statutory mandate.<sup>40</sup> HRS 269-91 requires utilities in Hawai‘i to have renewable electrical energy sales that account for 30% of net electricity sales by December 31, 2020; and 40% of net electricity sales by December 31, 2030. HRS 269-91. According to Hawaiian Electric, as of 2/15/2021, “Hawaiian Electric achieved a 34.5 percent consolidated renewable portfolio standard (RPS) in 2020[,]” and HELCO achieved an RPS of 43.4 percent in 2020.<sup>41</sup>

Both HELCO (Hawai‘i island) and the HECO Companies (HECO, MECO, and HELCO combined) have met and exceeded their statutory RPS mandate for 2020 (with HELCO already exceeding its RPS target for 2030). Therefore, newly proposed generation projects, such as the proposed Hu Honua A&R PPA, must “demonstrate that the project provides cost reduction benefits to ratepayers, directly or indirectly, by improving and maximizing the integration of additional lower cost renewable energy.”<sup>42</sup> Accordingly, because the preponderance of the

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<sup>40</sup> See *Decision and Order No. 31759* at 96, filed Dec. 23, 2013, Rejecting HECO-HELCO-Aina Koa Pono-Ka'u LLC Biodiesel Supply Contract with Docket No. 2012-0185; *Decision and Order No. 31758* at 121, filed Dec. 20, 2013, Approving HELCO-Hu Honua PPA, DN 2012-0212.

<sup>41</sup> <https://www.hawaiianelectric.com/hawaiian-electric-hits-nearly-35-percent-renewable-energy-exceeding-state-mandate>

<sup>42</sup> See *Decision and Order No. 31759* at 96, filed Dec. 23, 2013, Rejecting HECO-HELCO-Aina Koa Pono-Ka'u LLC Biodiesel Supply Contract with Docket No. 2012-0185; *Decision and Order No. 31758* at 121, filed Dec. 20, 2013, Approving HELCO-Hu Honua PPA, DN 2012-0212.

evidence clearly establishes that the Hu Honua project will **not** provide cost reduction benefits to ratepayers, the commission must decline to approve the PPA.

### **C. Hu Honua's Purported Ancillary Services Are Not Needed**

Like the unnecessary and costly excess capacity that the Hu Honua project would impose on the HELCO grid, the purported ancillary services associated with the project are also superfluous. The ancillary services that Hu Honua argues its project would provide must be considered within the context of the numerous renewable energy **and storage** projects that are already in the development pipeline, as well as future projects that are likely to be proposed for the HELCO grid. Indeed, there is abundant evidence in the record that supports the proposition that solar-plus-storage or stand-alone storage projects can provide firm, dispatchable renewable energy and ancillary grid services at prices far below that of Hu Honua's A&R PPA.

Moreover, Hu Honua's assertion that it has more "firmness" than alternative renewable sources of supply ignores the revolution in storage technology, synchronous condensers, grid-forming Inverter-Based Resources and the increasing availability of grid management services to stabilize the grid.

### **D. Approval of the A&R PPA Would Result in the Displacement and Curtailment of More Economical and Less Harmful Renewal Energy Projects**

The excessive cost and inflexible nature of the Hu Honua A&R PPA will lead to the displacement of existing and future renewable energy supplies that are both more economical and less harmful to public health and the environment. With an extended thirty-year contract term, the Hu Honua PPA locks the HELCO ratepayers/grid into an inefficient, costly, and harmful feedback cycle that will preclude the adoption of more cost-efficient and less harmful energy resources. Far from promoting the public interest, the Hu Honua A&R PPA requires HELCO to dispatch Hu Honua's costly energy at 10 MW minimum, 24 hours a day, seven days

a week, for a minimum of 30 years, regardless of how unnecessary, inefficient, comparatively expensive, or polluting the facility is shown to be once it is operational.

HELCO has explained that:

Any resource with a minimum must-take will need to be operated ahead of lower-cost energy up to that must run amount, and therefore any must-run constraint will limit cost optimization. This is true for existing operational constraints including the existing must-take as-available renewable resources, the minimum dispatch limit for presently operated conventional plants, take-or-pay contracts, scheduled energy, the uncontrollable distributed energy resources, and any resource that must be operated for reliability must-run purposes.<sup>43</sup>

Thus, if Hu Honua is permitted to come on-line, it will lead to the curtailment of renewable resources, such as Tawhiri, and will hinder the integration of new renewable resources on the HELCO System. Simply put, Hu Honua's minimum dispatch makes it impossible to ensure that no renewable resource energy output will be displaced.<sup>44</sup>

The Consumer Advocate's analysis found that:

From HELCO production simulation results (including Puako Solar), we estimate that approximately 42% of Hu Honua's energy generated would offset fossil fueled generation and 58% of Hu Honua's energy generated would offset renewable energy generation during the 30- year analysis. HELCO's statement of over 90% of Hu Honua generation offsetting fossil fueled energy appears to be true only in the first two (2) years of the 30-year analysis.<sup>45</sup>

Moreover, as explained below, Hu Honua's production simulation models are patently unrealistic.

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<sup>43</sup> HELCO response to PUC-HELCO-IR-21 filed Dec. 1, 2021

<sup>44</sup> Tawhiri Power Prehearing Statement of Position at 10-11, filed Dec. 21, 2021

<sup>45</sup> CA Exhibit HHB-CA-SIR-16 at 7, Consumer Advocate's Second Errata to its Supplemental Response to HHB-CA-SIR-16 filed January 3, 2022

## **1. Hu Honua's Production Simulation Models Are Unrealistic**

As shown by the Production Simulation Models (both including and excluding the Puako Solar project), the Hu Honua project will displace a large quantity of both current and future renewable energy resources from the HELCO grid, with the project's primary displacement of fossil fuel energy sources being projected to occur only in the first two years of the project's lifespan. While this alone should be enough to preclude the approval of the A&R PPA, these Production Simulation Models rely on unreasonable assumptions that mask the full extent to which the Hu Honua project will displace renewable energy resources.

It is undisputed that "Hu Honua cannot sell electricity to HELCO UNTIL Hu Honua has a Commission-approved power purchase agreement AND applies for and receives one or more discretionary permits from the Department of Health."<sup>46</sup> HELCO's Production Simulation Model is predicated on the fact that Hu Honua will come online in 2022, that it will displace more fossil fuel in the early years and less in the later years, and that Hu Honua will replace less renewables in the early years and more in the later years since the use of fossil fuel will decrease over time and head towards zero.<sup>47</sup>

Assuming Hu Honua comes online, the starting year is critical in determining what energy sources Hu Honua will displace over the lifetime of its biomass facility. If the actual starting year is later, HELCO's Production Simulation Model will necessarily underestimate the percent of generation from other renewable energy systems that Hu Honua will displace.

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<sup>46</sup> Decision and Order No. 31759 at 96, filed Dec 23, 2013, Rejecting HECO-HELCO- Aina Koa Pono-Ka'u LLC Biodiesel Supply Contract with Docket No. 2012-0185.

<sup>47</sup> See (a) HECO response to HHB-HELCO-IR-3, filed October 21, 2021, (b) HECO response to CA/HELCO-SIR-31, filed November 18, 2021, (c) "with Puako Solar removed", HECO response to PUC-HELCO-IR-17, filed November 29, 2021, and (d) "assuming the facility is allowed to begin operations in 2022," HECO Response to PUC-HELCO-IR-17, Attachment 3: Project GHG Emissions Analysis by Ramboll at 32, 36, filed November 29, 2021.

The Production Simulation Model’s assumption that Hu Honua will come online *this year*, in 2022, is not credible in light of many indications that this timeline is highly unrealistic. There are numerous reasons why the Hu Honua is unlikely to be commercially operational this year, including the community’s 14-year resistance to the project and the fact that Hu Honua has yet to obtain permits for, let alone complete construction of its 800-foot-deep industrial wastewater injection wells.

While Hu Honua asserts that the procurement of permits for their planned injection of nearly eight billion gallons/year of hot, industrial wastewater into 800-foot-deep injection wells located less than 100 feet from the ocean will not adversely affect the Project timeline, recent litigation related to injection wells in Hawai‘i demonstrates that this is clearly not the case. In 2020, the U.S. Supreme Court held that the Clean Water Act (“CWA”) requires projects to obtain a permit when the project causes a direct discharge from a point source into navigable waters or where there is “*the functional equivalent of a direct discharge from the point source into navigable waters.*” *Cty. of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1468 (2020) (emphasis added).<sup>48</sup> In other words, where pollutants that originate from a point source are found to reach navigable waters through mechanisms such as seepage and/or groundwater transport, the source must obtain a National Pollutant Discharge Elimination System (“NPDES”) permit from the Environmental Protection Agency. *Id.* The facts of the case that led to this ruling are strikingly similar to the issue presented by Hu Honua’s proposed use of wastewater injection wells.

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<sup>48</sup> The Commission may take judicial notice of the publicly filed documents in the federal lawsuit.



In *Hawaii Wildlife Fund*, the Lahaina Wastewater Reclamation Facility did not obtain an NPDES permit prior to injecting 1-2 billion gallons of wastewater/year into underground injection wells located a half mile from the ocean. *See id.* at 1489. Detailed studies revealed that the wastewater was seeping through Hawai'i's porous rock, into groundwater, and out into the ocean, thus constituting a discharge that required the issuance an NPDES permit. *Id.*

In the case of Hu Honua, the facility has not sought an NPDES permit for its injection of nearly 8 billion gallons of wastewater/year into underground injection wells located less than 100 feet from the ocean. In order to operate its planned injection wells, Hu Honua will need to obtain a permit from the Department of Health ("DOH"). Although Hu Honua maintains that it does not need to obtain an NPDES permit as part of this process, this assertion is called into question by the fact that the Project's wastewater discharge is 6 times greater and 25 times closer than the discharge at issue in *Hawaii Wildlife Fund*.<sup>49</sup> This issue will undoubtedly cause enormous delays to the commercial operations date of the Project because DOH will either: (a) require Hu Honua to obtain an NPDES permit (a time-intensive process that would require Hu Honua to conduct an Environmental Assessment or an Environmental Impact Statement); or (b) DOH will not require an NPDES permit, in which case the underlying permitting process would result in a lengthy contested case proceeding and associated appeals. Indeed, five entities, including Life of the Land, have already sought a contested case hearing related to Hu Honua's failed 400-foot injection wells and were told that they must refile their request once a draft permit has been issued for the newly proposed 800-foot injection wells.<sup>50</sup>

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<sup>49</sup> See Life of the Land's Response to Order No. 37233 at 12-13, filed August 20, 2020.

<sup>50</sup> *Id.*

In light of *Hawaii Wildlife Fund*, it is exceedingly likely that Hu Honua will be required to obtain an NPDES permit either directly by DOH or as a result of a future contested case proceeding. Either way (and even if the contested case results in a decision that NPDES permits are not required), the commercial operations date for the Project would be delayed by years. Such a delay would invalidate many, if not all, of the assumptions related to the Project including the Production Simulation Model, and wreak havoc on the ability of the Commission and the utility to plan for the integration of new energy resources on Hawai'i Island. The unrealistic assumptions related to the Project timeline, together with the insufficient and inconsistent information regarding the Curtailment and Displacement of renewables demonstrates that this Project will not lead to the retirement of fossil fuel power plants and that the Project will displace cheaper and cleaner renewable alternatives. As such, the Commission should not approve the A&R PPA.

#### **VIII. THE COST PER kWh OF THE A&R PPA IS UNREASONABLE AND NOT IN THE PUBLIC INTEREST**

According to the analyses before the Commission, approval of the A&R PPA will result in increased monthly bills for HELCO ratepayers. At an initial cost of 22 cents/kWh, even ignoring a 15% escalation clause six years into the contract, *Hu Honua is a far more expensive source of energy than both existing firm-power generation and recently approved solar plus storage projects*. Beyond the fact that the Project will increase costs to ratepayers, the record before the Commission does not include sufficient information to determine precisely how the costs for the A&R PPA were determined. However, it is interesting to note that Hu Honua's Second Amended Complaint against HELCO includes an allegation that "Hu Honua has suffered

lost profits in the amount of \$435 million over the 20-year term of the earlier PPA,” suggesting an average annual *profit* of over \$20 million.<sup>51</sup>

Although this project is not currently subject to the competitive bidding process (legally, there is no barrier if the Commission so ordered), the question of whether the cost of the Hu Honua project is reasonable requires an analysis of alternatives. Under either the competitive bidding framework or an analysis of the reasonableness of costs, the Hu Honua project would likely be found unreasonably expensive and unnecessary. As noted above, the Commission stated in its Order No. 37205, that “the initiation of Docket No. 2017-0352 and the resulting RDG-PPAs have produced real alternatives against which to evaluate the benefits and costs of the Hu Honua Project.”<sup>52</sup>

Tawhiri discussed this pressing concern in their Prehearing Statement of Position:

HELCO and Hu Honua asserts that Hu Honua is uniquely positioned to address the State renewable energy goals. Clearly this is not correct. The only thing unique about Hu Honua is its high cost to HELCO’s ratepayers. For example, HELCO’s ratepayers, with the addition of the two RDA-PPAs, will experience a decrease in their bills during the life of the RDA-PPAs. However, if Hu Honua’s Amended PPA is approved, HELCO’s ratepayers would be burdened with a significant rate increase during the entire 30-year term of the Amended PPA. According to HELCO, the average monthly bill for a typical residential customer (500 kWh) will increase by \$13.69 per month during the entire 30-year term of the Amended PPA.<sup>53</sup>

...

Hu Honua likes to assert that their project will create 197 new jobs for Hawaii Island, but it neglects to mention that it will raise the electricity rates of the approximate 85,000 ratepayers of Hawaii. Thus, even if we accept Hu Honua’s claim of 197 new jobs, it is outweighed by the remaining approximate 84,803

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<sup>51</sup> Case 1:16-cv-00634-JMS-KJM, Document 138, Filed 01/29/18. PageID#:2536.

<sup>52</sup> Order No. 37205 at 27, filed July 9, 2020

<sup>53</sup> Tawhiri Power LLC's Prehearing Statement of Position at 6, filed Dec. 21, 2021.

ratepayers that will receive no benefits. Instead, these remaining approximate 84,803 ratepayers will be burdened with higher electricity rates, potential public health risks, and the possible destruction of their environment from the Hu Honua project for at least a generation.<sup>54</sup>

In short, the proposed Hu Honua project is much more expensive than recently approved solar plus battery projects. While solar plus battery projects will decrease rates, the Hu Honua project would raise rates. Moreover, the economic impacts and ratepayer impacts do not support the Commission's approval of the proposed project.

## **IX. HU HONUA IS NOT ENTITLED TO A "PREFERENTIAL RATE"**

Hu Honua is seeking to justify the Project's high cost (and the company's increased rate of return) through reliance on HRS 269-27.3, despite the fact that Hu Honua is not planning to engage in silviculture activities but is instead planning to contract that work out to third parties. As such, HRS 269-27.3 does not apply to this project and should not be used as a justification for Hu Honua's excessive costs. Once again, Hu Honua has not met its burdens in this Docket.

The Preferred Agriculture Act (185-2009 HB591 HD1 SD2), codified as HRS §269-27.3, was designed to give agricultural entities an added revenue stream:

It is the policy of the State to promote the long-term viability of agriculture by establishing mechanisms that provide for preferential rates for the purchase of renewable energy produced in conjunction with agricultural activities. The public utilities commission shall have the authority to establish preferential rates for the purchase of renewable energy produced in conjunction with agricultural activities.<sup>55</sup>

"Agricultural activities" are defined in HRS 269-1 as follows:

"Agricultural activities" means a commercial agricultural, silvicultural, or aquacultural facility or pursuit conducted, in whole

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<sup>54</sup> Tawhiri Power LLC's Prehearing Statement of Position at 13-14, filed Dec. 21, 2021.

<sup>55</sup> HRS §269-27.3(a); Life of the Land Pre-Hearing Statement of Position at 38, filed Dec. 21, 2021

or in part, including the care and production of livestock and livestock products, poultry and poultry products, apiary products, and plant and animal production for nonfood uses; the planting, cultivating, harvesting, and processing of crops; and the farming or ranching of any plant or animal species in a controlled salt, brackish, or freshwater environment.<sup>56</sup>

The question facing the Commission is whether these laws also provide incentives for entities that purchase agricultural goods from other entities, rather than engage in agricultural activities themselves. Although *de minimis* agricultural activity by an entity engaged in agricultural activities *may* support a bona fide request for a preferential rate, Life of the Land does not believe that the purchase of agricultural goods from others is sufficient. Suppose that a real estate developer chops down trees and then sells the wood to four companies: Company A burns the wood for electricity; Company B uses the wood to create a residential development of wooden homes with solar panels; Company C uses the wood to build frames for a large solar farm; and Company D uses the wood to build windmills. Life of the Land asserts that all the companies impact agricultural activities but none of these companies are entitled to preferential rates for the purchase of renewable energy produced “in conjunction with agricultural activities.” If any one of the companies qualifies for preferential rates, then they all would. This would be a Pandora’s Box, raising equitable claims versus special treatment, and may well open the floodgate to cross-subsidization manipulations and business exploitation of loopholes.<sup>57</sup>

The Hawai’i Farm Bureau Federation testified on Act 185:

Hawaii was a world leader in renewable energy production up to the 1980s. Other countries came to Hawaii to see how it was done. Rural areas of Hawaii obtained most of their energy from agriculture ...the sugarcane companies not only produced energy to meet their own needs but provided for the community as well. This is the model we need to increase our level of energy self-sufficiency. Our farms and ranches all

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<sup>56</sup> HRS 269-1.

<sup>57</sup> Life of the Land’s Prehearing Statement of Position at E 4, 5

need energy, whether it runs refrigeration to cool their produce or for processing plants, as many of our ranches look to vertically integrate to process their own beef. The excess energy could be sold to the utility as in the sugarcane model.<sup>58</sup>

...

Agriculture doesn't just happen. It happens because of farmers and ranchers. Farmers and ranchers need to be viable to remain in business. This bill provides a means to increase their viability by increasing their revenue base.<sup>59</sup>

HC&S also testified on Act 185, explaining that "this bill will assist in providing farmers with an additional means of sustaining their agricultural operations."<sup>60</sup>

Hawai'i Agriculture Research Center ("HARC") testified on Act 185: "HARC concurs with the Hawai'i Farm Bureau's position authorizing preferential rates to those who produce renewable energy for their own operations and sell the excess to the public utility."<sup>61</sup>

Richard Ha, owner and proprietor of Hamakua Springs, testified on Act 185, again elucidating the intent of the Act:

Our farm is located in Pepeekeo on the Big Island of Hawaii's Hamakua coast. There is an old irrigation flume that goes through my property and I have plans to install a hydroelectric unit to help power my vegetable operations as well as even the cars for my employees. If I have extra, I hope to sell it to the utility. This bill will help improve the bottom line for my business plan.<sup>62</sup>

Here, Hu Honua has failed to produce evidence, other than speculative testimony without assurances, that would demonstrate an adequate relation between the project and agricultural

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<sup>58</sup> LOL Exhibit 3 at 19, filed May 24, 2017

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid at 19-20

activities within (or outside) the state. The evidence that it *has* provided, however, establishes that Hu Honua itself will not be engaged in agricultural activities.

Hu Honua does not intend to plant trees itself, nor do they have a contract to plant trees. Rather, Hu Honua asserts that an investor has signed a contract to plant trees, that the investor will inform Hu Honua of the status of the plantings, and that Hu Honua will keep the Commission up-to-date. Obviously, this process can break down at numerous points. There is no penalty for failure to plant trees or failure to generate accurate data or to get the information to the Commission. Furthermore, there is no role for Life of the Land, the instigator that raised the issue of greenhouse gases in the first place. Life of the Land has characterized this as a Hu Honua assertion of “trust us.” Hu Honua refused to answer LOL’s questions, asserting that are “overbroad and unduly burdensome [] not relevant.” Without measurement and verification protocols in place, talk is cheap.<sup>63</sup>

Even assuming, *arguendo*, that Hu Honua is entitled to a “preferential rate,” there is nothing in the record before the Commission that would provide any meaningful guidance with respect to the determination of that preferential rate, including how those considerations should be balanced against all of the other consideration related to the PUC’s evaluation of the cost to ratepayers and the determination of whether the project is in the public interest.

The insufficient and inconsistent information regarding Preferred Agriculture, Razing, and Replanting does not support the Commission’s approval of the proposed Project.

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<sup>63</sup> LOL T-2 48:13-21, filed Sept. 16, 2021

**X. WHEN THE CONSIDERATION OF COSTS BROADENS TO INCLUDE HIDDEN AND LONG-TERM COSTS (READ: EXTERNALITIES), INCLUDING GHG EMISSIONS AND NON-GHG EXTERNALITIES, HU HONUA'S PROJECT IS UNREASONABLE AND CONTRARY TO THE PUBLIC INTEREST**

Life of the Land explained the concept of “externalities” as follows:

The term ‘externality’ refers to the shifting of costs from the cost causer to someone else. The effect is to decrease the cost to the causer, thereby increasing their profits. The final cost is usually greater, but it is shared by all rather than hoisted upon the cost-causer. Externalities can be intentional or unintentional, but the effects are the same. Related concepts are silos, boundaries, and/or constraints. Greenhouse gases, the existential and ultimate externalities, are emitted into the atmosphere because of Hawai'i governmental policies.<sup>64</sup>

**A. Legal Justification for Commission to Review Externalities**

State Environmental Policy (HRS §344) applies to all state executive branch entities including the Public Utilities Commission (HRS §344-2): “The purpose of this chapter is to [] promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humanity.” HRS §344-1. The environment is defined “the complex of physical and biological conditions that influence human well-being, including land, air, water, minerals, flora, fauna, energy, noise, and places of historic or aesthetic significance.” HRS §344-2. Moreover, HRS §344-3 provides that:

It shall be the policy of the State, through its programs, authorities, and resources to: (1) Conserve the natural resources, so that land, water, mineral, visual, air and other natural resources are protected by controlling pollution, by preserving or augmenting natural resources, and by safeguarding the State's unique natural environmental characteristics in a manner which will foster and promote the general welfare, create and maintain conditions under which humanity and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of the people of Hawaii.

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<sup>64</sup> Life of the Land Testimony and Exhibits at 27, filed Sept. 16, 2021



The importance of all executive branch entities to protect the environment is found in other sections of state law, including HRS §343-1:

The legislature finds that the quality of humanity's environment is critical to humanity's wellbeing, that humanity's activities have broad and profound effects upon the interrelations of all components of the environment, and that an environmental review process will integrate the review of environmental concerns with existing planning processes of the State and counties and alert decision makers to significant environmental effects which may result from the implementation of certain actions. The legislature further finds that the process of reviewing environmental effects is desirable because environmental consciousness is enhanced, cooperation and coordination are encouraged, and public participation during the review process benefits all parties involved and society as a whole.

While there is ongoing debate about whether the Public Utilities Commission can be the accepting agency for an Environmental Impact Statement, there is no question that the Commission, as a state agency, is required to "prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of humanity." HRS §344-1.

Life of the Land noted that the "right to a clean and healthful environment was first enshrined in the Montana State Constitution in 1972 and then in the Hawai'i Constitution in 1978. Its inclusion predates the modern discussion of climate change. Today, it includes all aspects of a clean and healthy environment, of which climate change is one aspect."<sup>65</sup> This is further evidenced by the fact that the Hawai'i Constitutional Convention "Committee reports mention the environment but did not mention greenhouse gas, climate change, or global warming."<sup>66</sup> The GHG and non-GHG impacts are now called "externalities," "hidden and long-term consequences," "hidden and long-term impacts," and/or "hidden and long-term costs."

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<sup>65</sup> Life of the Land's Initial Brief at 22, filed Sept. 16, 2019.

<sup>66</sup> Life of the Land's Testimony LOL-T-1 at 8: 122-26, filed January 28, 2020.

**B. The Life Cycle GHG Emissions for the Hu Honua Project Are Extreme, Unnecessary, and Unreasonable**

Hawai‘i has statutorily mandated zero emissions clean economy targets. Two relevant laws dealing with greenhouse gas emissions are HRS §269-6(b) and HRS §225P-5. In a procedural order related to utility fuel contracts with Par Hawaii Refining, LLC, the Commission explained the interplay between HRS §269-6(b) and HRS §225P-5:

[The Commission] believes that its existing responsibilities under HRS 269-6 are in consonance with the goals of HRS 225P-5's ‘Zero emissions clean economy target,’ such that considerations related to quantifying GHGs under HRS 225P-5 will be able to be addressed through the Commission's review of this matter pursuant to HRS 269-6.<sup>67</sup>

Here, the lifecycle GHG emissions<sup>68</sup> from the Hu Honua project are extreme, unnecessary, and unreasonable, as well as contrary to the State’s statutory goal of achieving carbon neutrality “as quickly as practicable, but no later than 2045.” HRS 225P-5.

All parties acknowledge that “[b]urning wood is inefficient and therefore emits far more carbon than burning fossil fuels for each kilowatt hour of electricity produced.”<sup>69</sup> In addition to the enormous GHG emissions that would be generated by Hu Honua’s burning of wood, a lifecycle analysis must also include the GHG emissions generated by the cultivation, harvesting, and transport of the biomass to the Hu Honua facility, as well as the GHG emissions generated

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<sup>67</sup> Procedural Order No. 37352 at 7-8 filed July 10, 2020, Docket No. 2020-0090. Life of the Land Testimony and Exhibits at 49, filed Sept. 16, 2021.

<sup>68</sup> Lifecycle emissions are “The estimated GHG emissions associated with the lifecycle [] from the following stages: 1. Upstream, which includes GHG emissions associated with raw materials extraction and manufacturing, transportation. [] 2. Operational GHG emissions are associated with on-island O&M activities. [] 3. Downstream GHG emissions are associated with transportation and decommissioning and disposal.” Decision and Order No. 37995 at 30-33, filed October 1, 2021, Docket No. 2018-0436.

<sup>69</sup> Letter from Scientists to the EU Parliament Regarding Forest Biomass (updated January 14, 2018). [http://www.pfpi.net/wp-content/uploads/2018/04/UPDATE-800-signatures\\_ScientistLetter-on-EU-Forest-Biomass.pdf](http://www.pfpi.net/wp-content/uploads/2018/04/UPDATE-800-signatures_ScientistLetter-on-EU-Forest-Biomass.pdf), Life of the Land's Initial Brief at 7-8, filed Sept. 16, 2019.

by appropriate management of waste products throughout the lifecycle. For reasons in evidence before the Commission, it is difficult to predict with any degree of precision the total GHG emissions the Hu Honua facility would generate based on a lifecycle analysis, other than to conclude that the GHG emissions would be enormous and substantially higher than emissions from fossil fuel generation of an equivalent amount of energy.

It is HELCO and Hu Honua's burden to come forward with an acceptable methodology and reliable data to meet its burden of proving the degree to which the GHG emissions generated by its Project, based on a scientifically sound and verifiable lifecycle analysis, would be offset by the sequestration of carbon over that same lifecycle. HELCO and Hu Honua have utterly failed to meet this burden of proof.

Hu Honua's assertion that their project will be carbon neutral cannot be effectively evaluated due to the lack of transparency and/or an agreed upon methodology for calculating emissions, among other issues, but even the general proposition that the Project will be carbon neutral fails under HRS 225P-5. While Hu Honua's plan to plant trees *outside* of Hawai'i as an offset for trees chopped down *in* Hawai'i *might* qualify as an offset under HRS 269-6(b), it certainly *does not* qualify as an acceptable offset under HRS 225P-5 because carbon sequestration outside of the state does not count as an offset against carbon emission within the state:

Considering both atmospheric carbon and greenhouse gas emissions as well as offsets from the local sequestration of atmospheric carbon and greenhouse gases through long-term sinks and reservoirs, a statewide target is hereby established to sequester more atmospheric carbon and greenhouse gases than emitted within the State as quickly as practicable, but no later than 2045.<sup>70</sup>

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<sup>70</sup> [emphasis added] HRS §225P-5(a) See also LOL T-2 Exhibits 1, 7, 8, 9, 10, 24, and 22. Life of the Land Testimony and Exhibits at 49, filed Sept. 16, 2021.

Hu Honua's tree growing contract is between Jennifer Johnson and NFF, neither of whom have any relationship to Hu Honua, based on the available evidence in the docket record. The agreement between Johnson and NFF states, "Each year, NFF will present to J. Johnson a selection of 3-5 potential projects, drawn from the following planting regions: • Pacific Northwest • Intermountain West • Great Lakes region • Southwestern U.S. • Southeastern U.S."<sup>71</sup> Hu Honua goes so far as to admit that the sequestration may not even occur within the U.S.: "Our preference is to regrow trees, replant on the island of Hawaii, and if not on the island of Hawaii, in the State of Hawaii, and if not in the State of Hawaii, some place on the earth."<sup>72</sup>

Even if sequestration by entities other than Hu Honua on land outside of Hawai'i (but "some place on the earth") is considered to be an appropriate and acceptable "offset" for the enormous GHG emissions that would occur on the Big Island, there is nothing in the record before the Commission that would allow the PUC to determine that there is no "double-claiming" of the relevant carbon offsets. Because HELCO has both the burden of producing evidence and the burden of proof with respect to Hu Honua's claim that its GHG emissions in Hawai'i are "offset" by sequestration elsewhere, the absence of such evidence is alone sufficient for the Commission to dismiss Hu Honua's claim of offsets.

**1. Uncertainty and Inability to Accurately Account for the Project's GHG Emissions Due to a Lack of Information/Contractual Terms**

It is currently not possible to calculate the projected GHG emissions associated with the project from the growth, harvesting, and transportation of the trees intended to be used as feedstock after the initial seven-year local supply has been harvested and burned because Hu

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<sup>71</sup> HU HONUA-204 at 5, Hu Honua Bioenergy, LLC's Prehearing Testimonies filed September 16, 2021.

<sup>72</sup> Warren Lee, Recording of Hearing, Hearing Day 2, March 2, 2022, at 07:29:43- 07:30:01.

Honua has not disclosed its intended source of trees beyond the first seven years of the thirty-year project term. In fact, it appears Hu Honua, itself, does not know where the future feedstock will be sourced, or what the associated emissions will be from that source.<sup>73</sup>

**Carbon Offsets:**

In December 2019, LOL asked about carbon offsets; “(a) Name each way that Hu Honua has considered offsetting carbon emissions (b) For each way considered, please provide all agreements, commitments, and other relevant documents.”<sup>74</sup> Although the agreement was signed in November 2019, and LOL asked about it in December 2019, Hu Honua refused to disclose it in January 2020:

Hu Honua objects to this information request to the extent that it is irrelevant to the issues in this proceeding, immaterial, unduly burdensome, vague and ambiguous, onerous, repetitious, unintelligible, argumentative, utilizes terms that have multiple interpretations but are not properly defined or explained, privileged, and/or subject to protection [] (a) During the 30 year term of this project, it is likely that new technologies will likely come to exist to remove carbon from the atmosphere. As such, the following list is not intended to be an all-inclusive list of possible ways Hu Honua will remove carbon from the atmosphere: • Planting commercial trees on Hawaii island; • Supporting the growth or protection of native forests in Hawaii; • Supporting the planting, growth, and/or protection of trees and biomass elsewhere, for example through the National Forest Foundation; [] (b) Hu Honua has entered into a fuel sales and purchase agreement with CN Renewable Resources, LLC for the supply of biomass feedstock to Hu Honua, which includes silviculture/planting. [] Other methods, in addition to planting on Hawaii island, will be developed as needed.<sup>75</sup>

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<sup>73</sup> See, e.g., Warren Lee, Recording of Hearing, Hearing Day 2, March 2, 2022, at 07:29:43-07:30:01.

<sup>74</sup> LOL/HHB-SIR-60 filed December 30, 2019.

<sup>75</sup> Hu Honua Replied on January 6, 2020; See LOL T-2 Exhibits 1, 26-28, 8, and 12. T-2: 46:17-47:23.

Hu Honua first documented the role of the National Forest Foundation in July 2020 after all testimony and exhibits had been filed in the post-*HELCO I* proceeding and after the Commission had rejected the Waiver for Competitive Bidding: “Hu Honua, by its affiliate(s), will also plant 1.25 million trees planted through the National Forest Foundation during the first five years of the Project for the benefit of offsetting GHG in connection with the Project.”<sup>76</sup> This speculative reliance on one or more unregulated “affiliates” is not sufficient to justify approval of the A&R PPA.

**GHG emissions in Hawai‘i must be offset by GHG sequestration in Hawai‘i:**

As discussed above, Hu Honua has not articulated a reliable or verifiable plan to ensure that its offset activities (planting trees that will not be cut down and burned) take place in Hawai‘i so as to facilitate compliance with HRS 225P-5. In fact, it is unclear what, if any, authority the Commission would have to ensure compliance with Hu Honua’s commitment to achieving carbon neutrality where Hu Honua is relying on the representations of third-party, unregulated entities and individuals, such as Jennifer Johnson and NFF, to fulfil its obligations for planting trees as an offset to those chopped down and burned in Hawai‘i. See further discussion about the difficulties associated with compliance and enforcement, below.

**Additionality:**

Additionality is the property of an activity being additional. It is a determination of whether an intervention has an effect when the intervention is compared to a baseline.

‘Interventions’ can take a variety of forms, but often include economic incentives. “The policy

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<sup>76</sup> Hu Honua’s Motion for Reconsideration of Order No. 37205 at 65, filed July 20, 2020.

intervention is Commission approval of the A&R PPA. The additionality is the Hu Honua behavioral change resulting from this policy intervention.<sup>77</sup>

**Original Harvesting Plans:**

Hu Honua asserted that:

All of the commercial eucalyptus plantations which have been secured by, or on behalf of, Hu Honua are 'additional' because such commercial plantations were originally planted and intended for commercial harvest. These are commercial crops. If not for the end commercial use, these plantations would not have existed in the first place. This is why, in many governmentally approved approaches such as California Cap and Trade, biogenic emissions are considered to be zero.<sup>78</sup>

There is nothing in the record that states that the trees were planted so they could be burned. Using trees for construction material would keep most of the carbon locked up. There is nothing in the record regarding whether the owners could sell carbon sequestration offsets that would permanently lock up the carbon. There is nothing in the record as to how the landowner's views have changed or remained static. The fact of the matter is that Life of the Land has sought to understand these issues, while Hu Honua has done everything possible to block this from being part of the record. Hu Honua asserts that only price and GHG are part of the legitimate record. "With respect to any 'environmental and public health costs'... these costs are confined within the context of GHG emissions under HRS § 269-6(b), as addressed by the Hawaii

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<sup>77</sup> "For a given proposed activity or class of similar activities, additionality is assessed relative to an unobserved baseline, which represents a scenario under identical conditions except for the absence of a recognized policy intervention." Exh. 26 at 5 filed in PUC Document Management System as Attachment 22 to LOL Testimony and Exhibits, filed Sept. 16, 2021 -- What is Additionality? Part 1: A long standing problem by Michael Gillenwater. See also: "Specifically, additionality is about whether and in which cases a policy intervention is causing behavior change." Exh. 27 at 5, Attachment 23 to LOL Testimony and Exhibits, filed Sept. 16, 2021. What is Additionality? Part 2: A framework for more precise definitions and standardized approaches by Michael Gillenwater

<sup>78</sup> Hu Honua Response to PUC-HU HONUA-IR-43(a), filed Nov. 22, 2021

Supreme Court in *HELCO I*.<sup>79</sup> This oversimplification of the issues related to externalities is not accurate nor persuasive.

#### **Alternative Uses for Leased Trees:**

Hu Honua pontificated that it could chop down all trees on Day 1: “These trees were planted and intended for harvesting and commercial use, and although it chose not to, Hu Honua had the option of removing all these trees immediately beginning on Day 1 of such leases or licenses.”<sup>80</sup> Hu Honua does not own the trees. CNRR does. Neither entity has the manpower or the trucks to carry out such an operation. There is nowhere to store all those logs that would pose an immense fire hazard. The unrecovered cost would be staggering. The verbiage is meant to show an alternative that could not occur.

Hu Honua has presented speculative testimony that the commercial plantations *might* be shifted into other uses absent use for the Project:

Without this foundational forestry industry on Hawaii Island, it is very likely that these lands with commercial forests will be deforested permanently and put to other uses that ultimately sequester less or actually emit carbon. For example, the land could be re-purposed for other low-sequestration agricultural activities, such as vegetable or coffee farming, or re-zoned to be developed for a housing development with concrete laid where trees once stood.<sup>81</sup>

Leaving aside the obvious fact that the commercial plantations might shift operations to “other low-sequestration agricultural activities . . . or [be] re-zoned to be developed for a housing development” after the trees have been harvested and burned, Hu Honua’s speculative claims

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<sup>79</sup> Hu Honua Response to PUC-HU HONUA-IR-39, Footnote 14, filed Oct. 29, 2021.

<sup>80</sup> Hu Honua Response to PUC-HU HONUA-IR-43(b), filed Nov. 22, 2021.

<sup>81</sup> Hu Honua T-1 at 28, filed September 16, 2021.



hardly rise to the level of evidence upon which the Commission could rely. Indeed, Life of the Land filed an Information Request seeking answers to some of these foundational questions:

Please provide all documents that these specific managed forests would be deforested permanently without the Hu Honua project (b) Please state whether Hu Honua will guarantee that these managed forests will not be deforested permanently if the Hu Honua project is approved. (c) Please state how Hu Honua knows that greenhouse gas emissions will increase on these managed forests if the Hu Honua project is not approved.<sup>82</sup>

Hu Honua asserted that the issue that they themselves had raised was in fact outside of the scope of the issues: “Hu Honua objects to this request, including all subparts, based on its Relevance Objection. [] Without waiving the foregoing objections, Hu Honua responds as follows: Hu Honua does not have documents responsive to this request.”<sup>83</sup>

The bottom line is that the vast majority of trees will remain trees unless the PUC approves the A&R PPA, in which case the trees will be destined for palletization and combustion. In that case, any remaining lifetime of carbon capture will be terminated, a loss that Hu Honua conveniently excludes from its lifecycle GHG analysis.

## **2. Biogenic Carbons Are Not a Carbon-Neutral Fuel Source in the Short or Medium Term**

Temporal issues are critical in multiple arenas. There is no equivalence between a dollar borrowed in 1900 and one repaid in 2000. Likewise, near term greenhouse gas reductions are of greater consequence than an equivalent reduction decades from now:

The Carbon dioxide equivalent (“CO<sub>2</sub>e”) metric is useful in some circumstances, but it hides wider issues. A ton of CO<sub>2</sub>e emitted today does not equal a ton of CO<sub>2</sub>e sequestered in the distant future, as this equivalence masks the need to cut CO<sub>2</sub>e emissions in the near term. Even if the emission and sequestration take place in the same time frame, there

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<sup>82</sup> LOTL SIR-6, filed Nov. 4, 2021

<sup>83</sup> Hu Honua response to LOTL SIR-6, filed Nov. 18, 2021.

may be substantially different impacts to biodiversity, pollution, and indigenous populations.<sup>84</sup>

This concern boils down to a scientifically sound and common-sense understanding that, while it takes just minutes or hours to burn a tree and release its carbon into the environment, it would take the tree's replacement many decades or even a whole century to remove an equivalent amount of CO<sub>2</sub> from the atmosphere. As a result, biogenic CO<sub>2</sub> emissions might be considered to be carbon neutral over a lengthy period of time, but they offer little help in addressing the urgent problems presented by the climate emergency.

According to the World Resources Institute, "An oft overlooked fact is that burning wood emits more CO<sub>2</sub> than fossil fuels per megawatt-hour (MWh) of electricity generated or per unit of heat generated."<sup>85</sup> The Center for Biological Diversity concurs: "The latest science shows that burning biomass for energy emits more carbon dioxide than coal and gas per megawatt-hour."<sup>86</sup> Moreover, carbon emission-sequestration parity is time-dependent. "It can be argued that the length of the carbon payback period does not matter as long as all emissions are eventually absorbed. This ignores, however, the potential impact in the short term on climate tipping points."<sup>87</sup> "While the simple 'burn a tree, grow a tree' formula may seem intuitively sound, research is showing that in many cases, cutting and burning trees for electricity actually increases

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<sup>84</sup> LOL T-2 filed Sept. 16, 2021

<sup>85</sup> Life of the Land's Initial Brief at 58, filed September 16, 2019; "INSIDER: Why Burning Trees for Energy Harms the Climate" by Craig Hanson, WRI Vice President for Food, Forest, Water & The Ocean & Janet Ranganathan, WRI Vice President for Science And Research, <https://www.wri.org/blog/2017/12/insider-why-burning-trees-energyharms-climate>

<sup>86</sup> Life of the Land's Initial Brief at 58, filed September 16, 2019; [https://www.biologicaldiversity.org/campaigns/debunking\\_the\\_biomass\\_myth/](https://www.biologicaldiversity.org/campaigns/debunking_the_biomass_myth/)

<sup>87</sup> Life of the Land's Initial Brief at 61, filed September 16, 2019; The Impacts of the Demand for Woody Biomass for Power and Heat on Climate and Forests. Duncan Brack. Environment, Energy and Resources Department, Chatham House

net carbon emissions for at least several decades, and sometimes for over a century.”<sup>88</sup> These timescales dwarf even the extended 30-year term of the A&R PPA and weigh against Hu Honua’s speculative, over-simplified, and scientifically unsound analysis of the Project’s GHG emission and sequestration plan.

#### **Carbon Fluctuations:**

The entire premise of Hu Honua’s proposed carbon offset plan is called into question by the expert analysis of Dr. Beverly Law, a Professor of Global Change Biology & Terrestrial Systems Science in the Department of Forest Ecosystems & Society at Oregon State University.<sup>89</sup> According to Dr. Law’s research, young trees are net carbon sources for the first 20-22 years of their lifecycle: “It’s not taking up as much carbon from photosynthesis as is given off by respiration from the soil and the trees.... People are being told or taught that young trees grow fast and vigorous, but when you look at the forest, the net of all the respiration and photosynthesis, makes them a source.” Moreover, Dr. Law explained that “[t]he easy way to look at it is you look at the leaf area you see all this open space on the ground. ... They’re not taking as much carbon up but they’re still releasing a lot from the soil, and they are still respiring.”<sup>90</sup> Hu Honua offered no evidence to dispute Dr. Beverly Law’s analysis that for young trees, respiration emissions exceed sequestration from tree growth, and thus young trees are carbon sources for the first 20-22 years of their life.

#### **HELCO piecemeal reliance on Hu Honua’s consultant re GHG Emissions:**

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<sup>88</sup> LOL Exh-10 filed September 16, 2021: Executive Summary, Forest Biomass Energy Policy in the Maritime Provinces: Accounting for Science, by East Coast Environmental Law Association.

<sup>89</sup> See LOL Response to HHB-LOL-SIR-18, filed November 18, 2021.

<sup>90</sup> Ibid.

In addition to all the above described problems with HELCO's analysis of Hu Honua's GHG impacts, the method and data that HELCO used to conduct its analysis raise serious concerns about the independence, reliability, and accuracy of the analysis:

“On September 16, 2021, HELCO filed its updated Green House Gas [] Analysis as HELCO-501. The updated GHG Analysis was done by HELCO's consultant, Ramboll US Consulting [] who as part of its analysis calculated the Avoided GHG analysis. However, Ramboll did not perform the Project's GHG analysis that is included in HELCO's updated GHG Analysis, it was done by a consultant retained by Hu Honua. Hu Honua's consultant, Environmental Resource Management's [] Project's GHG analysis was then inserted into the updated GHG Analysis submitted by HELCO. This piecemeal approach is different than what HELCO has previously done in prior and similar dockets, in which Ramboll also performed the project GHG analysis on behalf of HELCO. The fact that HELCO did not retain Ramboll to do all of the analysis is inappropriate and raises many red flags in regards to the credibility and validity of the updated GHG Analysis and the Net GHG Emissions calculated. For example, the analysis done by Ramboll does not include estimated GHG emissions for sequestration, while ERM's analysis does. Additionally, the production simulation used by HELCO contains assumptions that Hu Honua finds questionable.”<sup>91</sup>

HELCO has the burden of proof regarding GHG emissions.<sup>92</sup> This first-of-its-kind approach of merging two GHG analyses into one, where HELCO assumes the accuracy of the Hu Honua data, and where Hu Honua challenges the assumptions of the HELCO analysis, is not justified nor reasonable.

#### **Hu Honua's Position:**

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<sup>91</sup> Tawhiri Power LLC's Prehearing Statement of Position at 7-8, filed 12/21/2021 referencing "The assumptions used for the HELCO 2021 Production Simulation Scenario have not been communicated to Hu Honua and are questionable." Hu Honua T-1 at 21:17-18, filed Sept. 16, 2021

<sup>92</sup> ORDER NO. 33795 at 38, docket no 2015-0022, filed 7-15-2016 quoting *HRS* § 91-10(5)

According to Hu Honua, the NFF will plant trees that it hopes will sequester 0.5 metric tons of carbon per tree over a period of 100 years. Hu Honua assumed that sequestration rate is linear. In response to Commission questions about this assumption, Hu Honua explained that “[t]he 0.5 metric tons of sequestration from the tree (per NFF) was divided by 100 (lifespan of the tree per NFF). We only counted the sequestration that occurred during the 30 years of the project.”<sup>93</sup> The Commission asked follow-up questions: “Please provide the underlying assumptions and calculations used to determine that each NFF tree will sequester 0.5 metric tons of carbon over 100 years.” In response, Hu Honua acknowledged that there was no assurance that their assumption was reliable:

After NFF reports the carbon sequestration tons of CO<sub>2</sub>e based on the region, types of trees, and growth rate calculations (including survival rates), Hu Honua will update its CO<sub>2</sub>e annual sequestration accounting to adjust for NFF’s calculations [ ] the annual sequestration estimates for NFF trees using an allometric equation for each specific tree species planted cannot be determined at this time given that the specific tree species has not yet been determined by NFF.<sup>94</sup>

With nothing more than unsubstantiated representations based on admittedly incomplete information to support Hu Honua’s contentions, the Commission lacks the necessary information to adequately evaluate the Project’s carbon impacts and must therefore deny the PPA.

**C. Other Hidden and Long Term Costs Associated with Hu Honua’s Project, Including Toxic Air Pollution, Water Use and Discharge, Harm to Biodiversity, and Negative Impacts on the Community Weigh Against Approval of the A&R PPA**

In addition to the unnecessary and excessive GHG emissions associated with the Hu Honua project, other hidden and long-term costs associated with the project – including toxic air

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<sup>93</sup> Hu Honua response to PUC-Hu Honua-IR-52, filed December 1, 2021

<sup>94</sup> Hu Honua Response to PUC-Hu Honua-IR-68, January 10, 2022.

emissions, water use and emissions, harm to biodiversity, and negative impacts to the community – counsel against approving the A&R PPA.

### **1. Air Emissions**

The public health impacts associated with biofuel combustion facilities are well known and documented, with toxic air emissions of particulate matter (soot), nitrogen oxide, carbon monoxide, as well as other carcinogens such as benzene and formaldehyde causing severe harm to people and the environment.

Life of the Land asserts that biomass generators emit huge amounts of toxic gases that impact people and ecosystems. A group of Public Health Organizations, including the Allergy & Asthma Network, American Academy of Pediatrics, American Lung Association, American Public Health Association, Asthma and Allergy Foundation of America, National Association of County & City Health Officials, National Environmental Health Association, and Physicians for Social Responsibility sent a letter to Congress on September 13, 2016, explaining the serious public health concerns associated with biomass combustion:

The undersigned public health, medical and nursing organizations urge you to oppose policies that would encourage or expand the use of biomass for electricity production. Biomass is far from “clean” – burning biomass creates air pollution that causes a sweeping array of health harms, from asthma attacks to cancer to heart attacks, resulting in emergency room visits, hospitalizations, and premature deaths.

Biomass uses fuel sources, or feedstocks, whose combustion harms human health, including wood products, agricultural residues or forest wastes, and highly toxic construction and demolition waste. Burning biomass from any source generates immediate dangerous air pollution that puts health at risk.

Among the most dangerous of these emissions is particulate matter, also known as soot. These particles are so small that they can enter and lodge deep in the lungs, triggering asthma attacks, cardiovascular disease, and even death. Particulate matter can also cause lung cancer.

Biomass combustion also creates nitrogen oxide emissions, which are harmful in their own right and also contribute to the formation of ozone smog and particulate matter downwind. Ground-level ozone pollution can trigger asthma attacks and cause premature death, and newer research shows possible links to reproductive and central nervous system harm.

Burning biomass also creates carbon monoxide, which leads to headaches, nausea, dizziness, and in high concentrations, premature death, and carcinogens, including benzene and formaldehyde.

The dangerous air pollution from burning biomass endangers some people more than others. Millions of infants and children, older adults, individuals with respiratory or cardiovascular disease or diabetes, and individuals with lower incomes face a higher risk of suffering serious health effects from these pollutants.

In addition to emitting harmful conventional pollutants, some biomass processes also increase carbon emissions that contribute to climate change. The U.S. Environmental Protection Agency's Science Advisory Board is currently evaluating available research to answer questions about the net carbon emissions that result from burning biomass. In their 2012 letter to EPA from an earlier review, the Science Advisory Board noted that "[c]arbon neutrality cannot be assumed for all biomass energy a priori" and described the processes that can make biomass increase carbon emissions.

Scientists must be allowed to continue to review these impacts. The United States is already experiencing health harms as a result of climate change. Increased temperatures lead to heat-related illnesses and deaths and help make the formation of ground-level ozone more likely. More droughts lead to elevated particulate matter levels. More frequent and severe extreme weather events harm both physical and mental health. These trends are projected to continue, along with increased health threats from vector-borne diseases; food insecurity; food- and water-borne diseases; worsened allergy seasons; and many more.

Burning biomass creates proven harm to human health through direct air pollution impacts, as well as the potential for increasing climate change. Because of those threats, the undersigned public health, medical and nursing organizations ask that you oppose policies that would encourage or expand the use of biomass for electricity production. We urge you to protect human health by supporting the development of truly

clean, carbon-free sources of energy such as solar energy and wind power.<sup>95</sup>

Similar concerns were raised in a 2021 report from the Blue Ridge Environmental

Defense League:

Volatile organic compounds and nitrogen oxide emissions from biomass fuel production are high when compared to emissions from conventional oil wells and refineries. [] If the emissions of the biomass system are as large as or larger than those from a fossil-fueled plant, where is the benefit? Further, why would identical compounds be considered benign/positive in one case and malignant/negative in another?<sup>96</sup>

These concerns are supported by verifiable scientific data:

Comparison of permits from modern coal, biomass, and gas plants shows that even the 'cleanest' biomass plants can emit > 150% the nitrogen oxides, > 600% the volatile organic compounds, > 190% the particulate matter, and > 125% the carbon monoxide of a coal plant per megawatt-hour, although coal produces more sulfur dioxide (SO<sub>2</sub>). Emissions from a biomass plant exceed those from a natural gas plant by more than 800% for every major pollutant.<sup>97</sup>

Life of the Land has consistently raised these concerns, as well as the supporting scientific data, before the Commission:

Wood burning creates numerous toxic emissions that affect all life forms. Burning wood, coal, and petroleum fuels generate large amounts of hazardous and toxic emissions of carbon monoxide, nitrogen oxides, sulfur dioxide, particulate matter (PM 2.5, PM 10), volatile organic compounds, and hydrochloric acid. These emissions affect people, flora, and fauna. Nitrogen oxide emissions contribute to the formation of ozone smog and particulate matter downwind. Ground-level ozone pollution is linked to asthma attacks, reproductive and central nervous system harm, and premature death. Carbon monoxide causes headaches, nausea, dizziness, and in high concentrations, premature death. Among the most dangerous of these emissions is particulate matter, also known as soot.

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<sup>95</sup> Public Health Letter, LOL Exhibit 18 at 1-2, filed Sept. 16, 2021

<sup>96</sup> SMOKE AND MIRRORS A Report on Biomass, Bio-energy and Global Warming (2011) at 5. Blue Ridge Environmental Defense League. LOL Exh-7 filed September 16, 2021

<sup>97</sup> Trees, Trash, and Toxics: How Biomass Energy Has Become the New Coal (2014) at 5, by Mary S. Booth, PhD, Partnership for Policy Integrity, LOL Exh-12 filed September 16, 2021



These particles are so small that they can enter and lodge deep in the lungs, triggering asthma attacks and cardiovascular disease.<sup>98</sup>

## **2. Water Use and Discharge**

The Hu Honua project's enormous water usage (7.9 billion gallons per year) as well as the project's proposed use of injection wells just 80 feet from the ocean raise serious concerns related to two of Hawai'i's most precious (and legally protected) natural resources: fresh water and the near-shore aquatic environment. LOL has repeatedly sought information related to the impacts of the Hu Honua project on our state's freshwater and ocean resources, but Hu Honua has again declined to provide the necessary information to adequately evaluate the impacts:

Life of the Land asked questions about the injection wells:

(a) How close are the Hu Honua injection wells to the ocean? [] (c) How many gallons of water will enter the injection wells each hour? (d) Where will the water come from? (e) How will potential ocean contamination be monitored? (f) Please identify and quantify the anticipated metals and chemicals that will be in the wastewater. (g) Does Hu Honua believe that injection water potentially flowing into the ocean, and potentially affective the quality of the ocean water, can be a public trust issue?<sup>99</sup>

Hu Honua gave the same non-answer for each part: "Hu Honua objects to this question. It is not relevant or material to Issue Nos. 2.a.i or 2.b, which are the only issues for which the Commission authorized LOL's participation."<sup>100</sup>

The Hawai'i Supreme Court acknowledged LOL's expertise in evaluating questions related to the environmental impacts of Project wastewater were pertinent to LOL's participation in the docket:

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<sup>98</sup> Life of the Land Testimony and Exhibits at 35, filed Sept. 16, 2021

<sup>99</sup> LOL-IR-78, filed June 29, 2017

<sup>100</sup> Hu Honua Response to LOL-IR-78, filed July 7, 2017

In support of his agricultural expertise, Curtis also cited to a chapter that he authored in 'The Value of Hawai'i: Knowing the Past, Shaping the Future', which cites runoff into the ocean as one of the primary adverse environmental impacts associated with the use of biofuels for energy production."<sup>101</sup>

Following *HELCO I*, Hu Honua still refused to answer questions about injection wells:

For each injection well, please identify (a) its distance from the ocean, (b) the anticipated water flow average and range, (c) any potential metal or chemical that the water may contain, (d) how its impact to the ocean will be monitored, (e) the current depth of each well, (f) the anticipated salinity and temperature of the well water. RESPONSE: Hu Honua objects to this information request, including all subparts, as overbroad and unduly burdensome to the extent that it seeks information and/or documents that are not relevant to and outside of the scope of the issues in this remand proceeding.<sup>102</sup>

Despite Hu Honua's refusal to answer questions or provide necessary information regarding the hidden and long term costs of the Project on Hawai'i's aquatic resources, LOL continued to raise the issue:

Hu Honua dug 400-foot injection wells and tested them. The injection wells failed! Hu Honua is now digging 800-foot injection wells. Hu Honua's ocean impact analysis only exists for the 400-foot wells. Five entities—Claudia Rohr, Pepe'ekeo Shoreline Fishing Community, Sierra Club Moku Loa Group, Life of the Land, and Na Kupuna Moku O Keawe—sought a contested case hearing on the 400-foot wells. The Hawai'i Department of Health Clean Water Branch Hearing Officer asserted that the request was premature. The entities must refile after a draft permit has been issued. In the case of Lahaina Wastewater, 3.5 million gallons flow 600-1500 meters to the ocean. The Hu Honua flow is six times greater and 25 times closer to the ocean. In graphic terms, the daily flow into the injection wells would cover a football field (100 yards by 53 1/3 yards) with a depth greater than 60 feet and weigh more than 180 million pounds just 80 feet from the ocean. Obviously, the U.S. Supreme Court's Lahaina Wastewater decision mandates that if this proceeding advances, that Hu Honua immediately conducts an Environmental Impact Statement on how their accidental ocean discharges and intentional injection well discharges impacts Native Hawaiian

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<sup>101</sup> *HELCO I* at 6, May 10, 2019.

<sup>102</sup> Hu Honua responses to LOL-IR-2021-5, 8, 16, 30, 31, and 36, filed July 26, 2021; See also Life of the Land's Pre-Hearing Statement of Position at 90, filed December 21, 2021

submerged lands and ocean-based threatened and endangered marine species.<sup>103</sup>

The Commission must evaluate the high likelihood of the Project's significant detrimental impacts to Hawai'i's fresh water and oceanic resources. However, due to Hu Honua's refusal to provide pertinent information and the resulting incomplete record, the Commission lacks the information necessary to conduct such an analysis and must therefore reject the A&R PPA.

### **3. Harm to Biodiversity**

Our planet is currently undergoing a 6<sup>th</sup> mass extinction event that is causing the fastest loss of biodiversity in the history of humans. This appalling loss of biodiversity is unquestionably driven by human activity, including from the harvesting of forests and the pollution of industrial activities such as combustion for energy generation. Hu Honua's proposal to cut down and burn 6,000-7,000 acres of mature eucalyptus trees along the Hamakua Coast *in the first seven years of the thirty-year contract* will destroy habitat for numerous endangered/threatened terrestrial species such as native birds and bats, as well as harm aquatic resources, which will be impacted by the increased erosion and runoff caused by the deforestation. With Hu Honua having secured only seven years-worth of local forest to burn in their power plant, there is no telling where Hu Honua will source the remaining twenty-three years of forest fuel to support its operations—or how severe the externalities associated with the future sourcing would be.

Again, Hu Honua has refused to provide the necessary information to enable an adequate evaluation of the project impacts on biodiversity. Specifically, LOL filed information requests in

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<sup>103</sup> Life of the Land's Response to Order No. 37233 at 12-13, filed August 20, 2020

reference to biodiversity to determine “(a) which consultants has Hu Honua hired, (b) which studies has Hu Honua relied upon, (c) what correspondence has Hu Honua had with the land owner, (d) what correspondence has Hu Honua had with the tree removal contractor, and (e) what in-house expertise does Hu Honua have?”<sup>104</sup>

Rather than answer the questions and provide the necessary information, Hu Honua responded with general conclusory statements unsupported by any evidence in the record: “Hu Honua will be relying on commercially planted eucalyptus plantations. Because these were cultivated specifically for eucalyptus, they are not as diverse as native forests. As such, the biodiversity impact from harvesting these plantations is likely much less than would be from harvesting a native and diverse forest.”<sup>105</sup> (Emphasis added).

Moreover, Hu Honua has explicitly refused to even consider the impacts of the proposed Project on endangered and/or threatened species: “Hu Honua further objects as the subject of bats or endangered/threatened species is not an issue in this proceeding and LOL’s attempt to expand the issues in this docket is improper.”<sup>106</sup>

Yale University ecologist Thomas Crowther led the most comprehensive study on global forests. The analysis was published in the journal Nature in 2015 and widely reported in the press. The world has 3.04 trillion trees. “There are currently fewer trees than at any point since the start of human civilization and this number is still falling at an alarming rate.” On an average year, 15 billion trees are chopped down, 5 billion trees are planted, resulting in a net loss of 10 billion trees per year. On average, the net loss exceeds one million trees per hour.<sup>107</sup>

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<sup>104</sup> LOL-HHB-SIR-51, file December 30, 2019

<sup>105</sup> Hu Honua Response to LOL-HHB-SIR-51, filed January 6, 2020

<sup>106</sup> Hu Honua Response to LOL/HHB-SIR-52(a), filed January 6, 2020

<sup>107</sup> Life of the Land Testimony and Exhibits at 32, filed Sept. 16, 2021

Tree-based biomass projects are complex. The ability to measure emission impacts can range from easier systems like pipes and smokestacks to very complex systems like non-point source pollution washing over diverse landscapes. Tree-based biofuel life cycle impacts are enormously difficult to calculate. Simply stated, tree-based bioenergy involves a staggering number of assumptions, variables, and temporal (time differentiated) impacts. Forest operations sometimes involve the use of synthetic fertilizers and pesticides. Forests are cut and sometimes replanted, impacting the soil, streams, other vegetation, causing air emissions and soil erosion opening areas for alien species, impacting humus oxidation, and changes to endangered and threaten species and other biodiversity.<sup>108</sup> In addition to being mandated by law, the precautionary principle places the onus on the proposer to prove that the project is reasonable and in the public interest.<sup>109</sup> Here, HELCO and Hu Honua have not even attempted to evaluate many of the potential impacts of the Project, much less carried its burden to establish that the Project is reasonable and in the public interest in light of the potential impacts.

#### **4. Community Impacts**

Approval of the A&R PPA will negatively affect the local communities along the Hamakua Coast through increased traffic, damage to roads/bridges from heavy trucking, public health impacts from toxic air emissions, and economic harm through increased costs of energy. Seeking to understand and evaluate the full range of community impacts, including traffic impacts, is not unique to the Hu Honua project. Indeed, in the Commission's Aina Koa Pono dockets, traffic impacts were part of the externalities examined. What is unique here, is Hu Honua's outright refusal to even consider the traffic impacts of their project. For example, LOL

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<sup>108</sup> LOL T-2 Exhibits 1, 7, 8, 10, 11, 19, 22, and 24, filed Sept. 16, 2021

<sup>109</sup> Life of the Land Testimony and Exhibits at 33, filed Sept. 16, 2021

posed the following questions to Hu Honua: “(a) Why would Pahala traffic for that docket, and not Pahala traffic for this docket, be a public interest issue? (b) What is the comparative Pahala logging operation for the two projects in terms of trucks per hour? (c) Please provide all Hu Honua traffic studies for the Waiakea area.” Hu Honua again declined to answer: “(a) Hu Honua objects to this question. It is not relevant or material to Issue Nos. 2.a.i or 2.b, which are the only issues for which the Commission authorized LOL's participation.”<sup>110</sup>

In response to LOL's request for the status of all traffic studies, Hu Honua likewise refused to answer: “Hu Honua objects to this information request as overbroad and unduly burdensome to the extent that it seeks information and/or documents that are not relevant to and outside of the scope of the issues in this remand proceeding.”<sup>111</sup> Several months later, Hu Honua expanded on their lack of traffic studies. “Hu Honua has not conducted any traffic studies focused on traffic outside of Pepekeo.”<sup>112</sup>

As to the Project's financial impacts to the community, Hu Honua again selectively presents the minimal positive impacts of the project while obscuring the numerous negative impacts. For example, despite Hu Honua's assertions that it will employ a local workforce for the project, the evidence has shown that Hu Honua employed workers from the continent to construct the project and that the few local jobs that will be created are projected to generate local income that is far less than the increased energy costs to the local community associated with the Project.<sup>113</sup>

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<sup>110</sup> Hu Honua Response re LOL-IR-77 filed July 7, 2017

<sup>111</sup> Hu Honua Response to LOL-IR-2021-40, filed July 26, 2021

<sup>112</sup> Hu Honua Response re LOTL SIR-10, filed Nov 18, 2021

<sup>113</sup> Tawhiri Prehearing Statement of Position t 13-14, filed Dec. 21, 2021

## **5. Conclusion**

Hu Honua's lack of disclosure regarding health, toxics, water, biodiversity, and community externalities does not meet the minimum standard required to comply with the Statement of Issues. The insufficient and inconsistent information does not support the Commission's approval of the proposed project.

## **XI. THE PUC SHOULD NOT DEFER PUBLIC TRUST CONSIDERATIONS TO OTHER AGENCIES**

Numerous other projects, including the Paeahu Solar project, have competed in a competitive bidding process. In that process, MECO considered the Paeahu Solar proposal against the other proposals on several issues including Community Outreach and Engagement, Cultural Resource Impacts, Environmental Review and Permitting Plan, and Environmental Compliance / Impacts. After being picked, Paeahu file numerous reports with the Commission dealing with various externalities.

As noted by the Commission in its approval of the MECO-Paeahu Solar PPA, Paeahu greatly expanded on disclosing impacts and providing studies, reports, and analysis within the regulatory proceeding:

Although the Statement of issues established in the Procedural Order for this proceeding only includes the review of PPA-related requests, large number of studies have been filed in the docket record that cover issues over which other government agencies have decision-making authority. These topics include but are not limited to traffic, noise, land uses (soils, topography, geology, vegetation), water quality, archaeological impacts, cultural impacts, wildlife, electric and magnetic fields ('EMF'), 'heat island' effects, and glint and glare issues, have all been addressed in detail in the record of this proceeding. Paeahu has hired several consultancies to prepare detailed studies for purposes of Paeahu's community outreach efforts. [] As discussed above, the Commission recognizes that the agencies that have jurisdiction over the approval process for the listed permits will review these studies, and are authorized by the applicable

statutes, rules, or ordinances to make the final determination of whether to grant the requested approval or permit.<sup>114</sup>

The Hawai‘i Supreme Court agreed with the Commission’s decision, noting that when there are potential impacts to public trust resources, the Commission must address them:

[W]e hold that the statutes governing the PUC’s PPA review – HRS §§ 269-6(b) and 269-145.5(b) - reflect the core public trust principles: the State and its agencies must protect and promote the justified use of Hawai‘i’s natural beauty and natural resources. Thus, when there is no reasonable threat to a trust resource, satisfying those statutory provisions fulfills the PUC’s obligations as trustee. But when a project poses a reasonable threat, the public trust principles require more from the PUC: the commission must assess that threat and make specific findings about the affected trust resource.

Here, the record shows that the PUC conducted the statutory balancing. Under HRS § 269-6(b), the PUC considered the need to mitigate the risks associated with fossil fuel-based energy; it also weighed other “technical, economic, environmental, and cultural considerations” under HRS § 269-145.5(b). The PUC then found the PPA “in the public interest.” Because the record lacks a reasonable threat to a trust resource, this public interest-minded balancing satisfied the PUC’s public trust duties.<sup>115</sup>

[T]he PUC identified (1) the permits that Paeahu would have to obtain to construct and operate its solar plant; (2) the impact studies<sup>116</sup> related to those permits; (3) which agency would review them; and (4) under what statutes, regulations, or ordinances. The PUC referred to Paeahu’s explanation that the studies’ intended audience was the permit-issuing agencies with the relevant subject matter expertise. The PUC concluded that those agencies with jurisdiction over the necessary permits would review the impact studies and make permitting decisions. Contrary to

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<sup>114</sup> Decision And Order No. 37340 at 127-32, filed October 5, 2020, Docket No. 2018-0433.

<sup>115</sup> In Re Maui Electric (March 2, 2022) at 3-4, SCOT-21-0000041

<sup>116</sup> In the Approval Order, the PUC explained that Paeahu filed several studies covering topics including: “traffic, noise, land uses (soils, topography, geology, vegetation), water quality, archaeological impacts, cultural impacts, wildlife, electric and magnetic fields (‘EMF’), ‘heat island’ effects, and glint and glare issues.” For each topic, the PUC identified record-citations where the topic was discussed. Though the PUC omitted the words, “public trust resources,” its findings evince meaningful and diligent efforts to appraise the range of trust resources potentially affected by the Project. By doing so, the PUC implicitly identified the scope of the affected public trust resources. The PUC’s efforts are consistent with its trustee duties given that the record lacks a reasonable threat to a trust resource.



Pono Power's claim, the PUC did not merely 'catalog[ue]' the requisite permits.<sup>117</sup>

By contrast, Hu Honua did the opposite. Hu Honua resisted disclosing information regarding community outreach and engagement, cultural resource impacts, environmental review and permitting plan, and environmental compliance/impacts. Much of the necessary information is still not available. Hu Honua will chop down millions of trees that serve as habitat for threatened and endangered species, release dangerous air toxics not limited to GHG, and use/inject billions of gallons of wastewater into the well within 100 feet of the ocean each year. Hu Honua proposes that "an average of about 28 truckloads of logs would be delivered to the power plant each day" for 30 years.<sup>118</sup>

As discussed above, it is irrefutable that "[b]iomass is far from 'clean' – burning biomass creates air pollution that causes a sweeping array of health harms, from asthma attacks to cancer to heart attacks, resulting in emergency room visits, hospitalizations, and premature deaths. [] Burning biomass from any source generates immediate dangerous air pollution that puts health at risk."<sup>119</sup> Hu Honua did not present adequate data or reports on these issues, precluding an actual evaluation of the impacts, and creating a situation where the Commission can do nothing more than "catalogue" the requisite permits.

Commission proceedings have examined externalities for 30 years despite the fact that many of the externalities are regulated by other agencies. For example, Department of Health

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<sup>117</sup> Ibid at 24

<sup>118</sup> Hu Honua Response to LOL/HHB-IR-144 filed December 9, 2019.

<sup>119</sup> Public Health Letter sent to Congress on September 13, 2016, by Allergy & Asthma Network, American Academy of Pediatrics, American Lung Association, American Public Health Association, Asthma and Allergy Foundation of America, National Association of County & City Health Officials, National Environmental Health Association, and Physicians for Social Responsibility. LOL Exhibit 18 at 1-2, filed Sept. 16, 2021

regulates the right to pollute, and Department of Land and Natural Resources regulates incidental take of endangered species. It must be noted that a project can meet all other agencies requirements and still be rejected by the Commission. Likewise, a project can be evaluated by the Commission before some or all other agencies have reviewed the project. Accordingly, the Commission has its own mandate: it does not determine the legality of all potential and/or actual impacts, rather, it determines whether a project is reasonable and in the public interest in light of those impacts. Put simply, the Commission's duty is to evaluate comparative impacts of potential projects and choose the project that most supports the public interest and the interests of ratepayers, while other agencies, such as Department of Health, are tasked with determining the legality of proposed projects and regulating the projected impacts of accepted projects.

Here, the Commission must review all relevant financial costs and non-financial costs (including externalities), as well as issues related to interconnection, reliability, resilience, and other factors to determine whether a proposed project is reasonable and in the public interest. Because HELCO and Hu Honua have not provided the necessary information to support an adequate review and analysis, the Commission is unable to fulfil its statutory and common-law obligation to consider the above factors prior to approving the A&R PPA.

The Commission has recently increased its requirement for the disclosure of information regarding discretionary and ministerial permits required by other agencies.<sup>120</sup> This effort has increased due to greater intervenor requests, utility transition plans, supply chain disruptions, force majeure, and other factors. Being aware of outstanding permits before other agencies is distinct from having the jurisdiction to act on a permit.

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<sup>120</sup> Order No. 37624 at 12, filed Feb. 11, 2021. HECO Transition Plans, Docket No. 2021-0024; Life of the Land Testimony and Exhibits at 24, filed Sept. 16, 2021

It is the usual practice of the Commission to evaluate the permit status for projects that are seeking Commission approval. In practice, the utility typically discloses predicate non-Commission permits in its applications and answers questions related to those issues. For example, the Commission has inquired and evaluated other agency permits for projects such as the Superferry,<sup>121</sup> utility rate cases such as the 2009 proceedings related to the Molokai Public Utilities,<sup>122</sup> for island-wide renewable energy project solicitations in the HELCO territory,<sup>123</sup> as well as for numerous PPAs for individual renewable energy projects such the Aina Koa Pono application,<sup>124</sup> the Ka La Nui Solar application,<sup>125</sup> the Paeahu Solar application,<sup>126</sup> and the Puna Geothermal Venture<sup>127</sup> to name just a few.

Being aware of outstanding permits before other agencies is distinct from having the jurisdiction to act on a permit: “the Commission recognizes that the agencies that have jurisdiction over the approval process for the listed permits will review these studies, and are authorized by the applicable statutes, rules, or ordinances to make the final determination of whether to grant the requested approval or permit.”<sup>128</sup> However, in fulfilling its obligation to regulate in the public interest, the Commission has acknowledged that it is necessary to evaluate

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<sup>121</sup> PUC IR-3, filed November 30, 2004, Docket No. 2004-0180 Hawaii Superferry, Inc.

<sup>122</sup> PUC-IR-103, filed October 16, 2009, filed October 16, 2009, Docket No. 2009-0048, Molokai Public Utilities, Inc. (MPU) - General Rate Case.

<sup>123</sup> Hawaiian Electric Companies Final Stage 2 Renewable and Grid Services RFPs Book 5 of 7 Filed August 22, 2019. Exhibit 3: Final Variable Renewable Dispatchable Generation and Energy Storage Stage 2 RFP for the Island of Hawaii, including the final model RDG PPA for both PV and wind, and the Energy Storage PPA.

<sup>124</sup> Responses filed July 27, 2011, Proposed HELCO-Aina Koa Pono PPA, Docket No. 2011-0005.

<sup>125</sup> PUC-IR-101, Docket No. 2014-0308, filed February 13, 2015.

<sup>126</sup> Paeahu Solar. Decision and Order No. 37340. #35 at 118-20, filed October 5, 2020.

<sup>127</sup> Commission Letter to Puna Geothermal Venture, Docket No. 2019-0333, filed August 4, 2021. PUC-PGV-IR-118.

<sup>128</sup> Paeahu Solar. Decision and Order No. 37340 #71 at 132; #81 at 134-35.

the universe of potential impacts related to a project including the associated permitting status and timelines that will regulate said impacts.<sup>129</sup> The non-price analysis does not overstep the jurisdictional boundaries between agencies or interfere with other agencies' regulatory responsibilities.

Here, Hu Honua's refusal to timely disclose the status of its predicate permits or acknowledge obvious potential delays for the issuance of outstanding permits, precludes the Commission's ability to evaluate whether the project is reasonable and in the public interest.<sup>130</sup> Without understanding the status of Hu Honua's permitting process, the Commission is severely constrained in its ability to determine the potential impacts of the project, compare those impacts with the impacts of alternative options, and identify which agencies will review which impacts.

## **XII. HU HONUA'S SPECULATIVE STATEMENTS REGARDING USE OF INVASIVE SPECIES AND DEVELOPMENT OF HYDROGEN FUEL DESERVE NO WEIGHT**

Hu Honua's speculative statements regarding utilizing invasive species and supporting the development of hydrogen resources amount to performative greenwashing and weigh against the approval of the A&R PPA.

### **1. Speculative Representation to Utilize Invasive Species**

Throughout the proceeding, Hu Honua has asked the Commission to rely on speculative representations and conjecture in reviewing and approving the A&R PPA. For example, Hu Honua has represented that it "confirms its commitment to utilizing up to 10% invasive species. However, whether the invasive species is made available and/or delivered to Hu Honua depends on third party collaboration."<sup>131</sup> Despite Hu Honua's characterization of this statement as a

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<sup>129</sup> Order No. 37624 at 12, Docket No. 2021-0024, filed February 11, 2021

<sup>130</sup> Hu Honua Response to PUC-Hu Honua-IR-13, filed October 29, 2021

<sup>131</sup> Hu Honua Response to CA/Hu Honua-IR-125(e), filed Oct. 21, 2021

“commitment,” both the Consumer Advocate and the Commission identified the speculative nature of the language used in making that “commitment.” The testimony and evidence have established that:

“Hu Honua offers that its facility ‘could’ assist with the invasive species on Hawaii Island.”<sup>132</sup> Hu Honua is “committing” to utilize 0.0% to a maximum of 10.0 % invasive species. “Regarding the potential to utilize invasive species as a boiler fuel source, an analysis has not been performed to date. Once Hu Honua is able to have a complete understanding of the State and/or County needs with respect to invasive species utilization, Hu Honua can complete a full analysis. Hu Honua would not have the correct information to perform an analysis without such understanding.”<sup>133</sup> A commitment to “utilize 0% to a maximum of 10.0% invasive species” is not a commitment that can be relied upon; such a statement can hardly even be characterized as a goal.

Indeed, the Commission itself identified the duplicity of Hu Honua’s assertions related to its speculative use of invasive species:

Chair Griffin: You said you have discussed with DLNR and others’ ability to use invasive species in the plan. But I just want to contrast this with what I read in your testimony, and this is page 15 section 3, the one titled on feedstock, the question says what will be the project’s primary fuel source, and line 17, starting at 17 says, while Hu Honua’s open to considering other kinds of fuel stock made available to Hu Honua at this time there has been insufficient information regarding the availability of such feedstock so no decision has been made, yet regarding the use of other types of feedstocks to supplement the supply of eucalyptus. How do I square, what I read there is you don’t have enough information to really confirm that you’re going to use other feedstocks.

Warren Lee: Our primary feedstock is still the grandis eucalyptus,  
Chairman Griffin.

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<sup>132</sup> Hu Honua Response to CA/Hu Honua-IR-125, filed Oct. 7, 2021

<sup>133</sup> Hu Honua Response to CA/Hu Honua-IR-125(a), filed Oct. 21, 2021

Chair Griffin: Okay. But I guess what was necessary for other, I guess what would be sufficient information for other types of feedstocks?

Warren Lee: The other type of information, for example, if its strawberry guava, as I mentioned, on the 500,000 acres of, 600,000 acres of DLNR land. We have been working with the DLNR on how to access that as a supplemental feedstock. You don't have to, I don't think we're going to plan to harvest all 600,000 acres at one time. We will take, do this slowly and supplement the eucalyptus grandis. I hate to say this but strawberry guava, is that they grow where there are no roads, its limited access, so you are going to basically have to deliver, develop the infrastructure to harvest, and when you look at the strawberry guava, the question is what is the state going to do? What is their role and responsibility? And what is going to be our responsibility? For example, their responsibility may be cut the strawberry guava, stack it, and then we would go in and maybe chip it, and haul it to the plant. But all those details need to be worked out. And then if the State DLNR comes back and says, well you got 600,000 acres here, you cannot do this, so many acres we have to do an EA, or something, then we still run into roadblocks. But again, same thing with the gorse. And same thing with the albizia because, in the meantime, the State of Hawaii, almost every other Legislature, they provide to state, county, and in some cases HELCO, as a group, millions of dollars for albizia eradication. So, why not work together, with us. Rather than taking that albizia that is being eradicated with state money and taking it to the county landfill where it will decompose and release CO2. Why not we work together with you, and you bring it to the plant, whatever the details are, and we'll take care of it. And then the better part of it is that if we take care of so many tons of albizia through our sequestration program and measurements, we will replace it with a legacy tree. How perfect can that combination be? But, the devil is in the details, Chairman.

Chair Griffin: I understand, and it sounds like your testimony says that there is not enough detail for any of these other feedstocks yet, so when is that, when would that be forthcoming?

Warren Lee: That's really good question. You know, we're working, and working with different people, different agencies. Does that mean I would have an agreement before November of this year? Or do I have to wait for the next administration to come in and talk to the new department head. All of this is, from my perspective, slow moving. But agreement in general principle.

Chair Griffin: Okay but I guess what I take away from this is none of that exists yet. That is why you put in your testimony that there's insufficient information.

Warren Lee: Right. The only thing we have, that I can say is more definitive than working with state or county agency, is we've got small landowners, that most of them, some of them, have been displaced, by the lava, from Puna, and they moved to the Hamakua coast. They cleared the land, for planting, albizia. They called us and said, do you want this albizia, and I said we'd love to have it but I can't take it because I don't have an operating plant.<sup>134</sup>

As the above exchange clearly illustrates, Hu Honua does not have a plan to utilize invasive species. Rather, they provide nothing more than conjecture couched in speculative language. The Commission may not rely on speculative, wishful thinking to evaluate the Project.

## **2. Speculative Plans to Exploit HELCO Ratepayers for Unfair Economic Benefit Regarding Hydrogen Energy**

In contrast to the excessive cost at which Hu Honua would supply energy to HELCO ratepayers under the A&R PPA (escalating from \$0.22/kWh), Hu Honua has articulated plans to sell excess energy to a third-party hydrogen stakeholder at a fraction of the price (\$0.10/kWh). This plan raises a number of issues that the Commission must consider in evaluating the A&R PPA.

Where, as here, Hu Honua's A&R PPA includes energy costs that are considerably higher than other sources of renewable energy and will result in increased energy costs for HELCO ratepayers, the fact that Hu Honua is planning to sell electricity to HELCO at *more than double* the price it intends to sell the same electricity to third party stakeholders provides additional support for the proposition that the A&R PPA is unreasonable and not in the public interest. As illustrated by the obvious disparity in price between the electricity Hu Honua intends to sell to private third-party stakeholders and the electricity it sells to HELCO, Hu

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<sup>134</sup> Warren Lee, Recording of Hearing, Hearing Day 2, March 2, 2022, at 08:08:50 - 08:14:25.

Honua's proposed third-party electricity sales will unfairly burden HELCO ratepayers with the fixed costs associated with the project, thus causing the ratepayers to subsidize the cost of energy sold to the third-party hydrogen stakeholder. It is unclear from the record why Hu Honua and the hydrogen stakeholder should be allowed extract private benefit from ratepayer-subsidized electricity rates rather than purchase the necessary electricity from HELCO and thus contribute to the overall fixed costs of the Hu Honua facility and the HELCO grid as a whole.

As they have throughout the proceeding, Hu Honua has asked the Commission to rely on their speculative representations to approve the A&R PPA prior to definitively addressing numerous outstanding issues that affect the rights of the parties, the ratepayers, and the public. Here, Hu Honua has not explained how it would transmit the energy from its facility to the third-party hydrogen stakeholder without running afoul of the prohibition against wheeling or causing itself to be subjected to additional shoreline management area regulation. Without a clearly articulated and feasible plan, Hu Honua's representations regarding the additional "benefits" that the project would provide related to hydrogen production (and to whom those benefits would flow), their representations should be treated as nothing less than illusory greenwashing.

Moreover, as discussed above, serious questions remain as to who would benefit from the plan: obviously, Hu Honua would benefit from the ability to sell excess energy to a hydrogen stakeholder; the hydrogen stakeholder would benefit from the provision of low-cost, ratepayer-subsidized electricity<sup>135</sup>; however, it is likewise clear that the ratepayers subsidizing such a plan would not see any benefit.

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<sup>135</sup> Due to Hu Honua's obfuscations of their corporate structure, investors, and affiliates, it is unclear what, if any, financial relationship Hu Honua has with the hydrogen stakeholder.



### **3. Environmental Review**

Potential triggers for an Environmental Assessment (“EA”) and/or Environmental Impact Statement (“EIS”) under HRS 343 include the use of State lands: Hu Honua has represented that it “is currently in discussions with a state agency [DLNR] regarding the availability of State land” for harvesting trees,<sup>136</sup> and with the State Department of Transportation and the County for harvesting invasives.<sup>137</sup> Another potential trigger under HRS 343 is development in the Shoreline Management Area: A dedicated way of transferring electricity from Hu Honua to a hydrogen facility is likely to be at least partially located in the Shoreline Management Area. Furthermore, HRS 343 is triggered if the project includes Ocean Emissions: the billions of gallons of wastewater that Hu Honua intends to inject into wells less than 100 feet from the ocean are likely to seep into state and federal waters, giving rise to the requirement of conducting an EA and/or EIS.

Hu Honua has studiously avoided discussing these numerous triggers of HRS 343, despite the fact that the potential requirement of conducting an EA/EIS would drastically change the timeline for bringing the Project online and thus invalidate significant portions of the Commissions analysis, including those related to the adequacy of supply, the production simulation model, and the curtailment of future renewable energy resources. Rather than be upfront about these potential triggers or, proactively undertake an EA/EIS, Hu Honua has hidden the ball and done less than the bare minimum to evaluate the Project’s potential impacts and comply with the intent of chapter 343. This short-cut approach is indicative of nearly every

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<sup>136</sup> Warren Lee, Recording of Hearing, Hearing Day 2, March 2, 2022, at 08:08:50 - 08:14:25

<sup>137</sup> Hu Honua Response to CA/Hu Honua-IR-128 filed October 21, 2021; Hu Honua Response to CA/HU HONUA-SIR-49 filed November 18, 2021, including Exhibit 3: Hawaii Department of Transportation, Highways Division Letter dated November 9, 2021; Hu Honua response to LOTL SIR-2 filed November 18, 2021

aspect of the Project and undercuts the Commission's ability to evaluate the Project timeline and associated impacts.

Hu Honua's discussions in the regulatory proceeding regarding burning invasive species and promoting hydrogen is entirely speculative in light of their insistence on postponing all decisions until after the A&R PPA has been approved. These speculative and unreliable goals amount to nothing more than greenwashing. This distortion is indicative of Hu Honua's attitude throughout the Project and further justifies rejection of the A&R PPA.

### **XIII. THE A&R PPA DOES NOT PROVIDE APPROPRIATE VERIFICATION AND COMPLIANCE PROCEDURES**

#### **The Commission Lacks Authority over Unregulated Third-Parties**

Numerous questions remain as to how, if at all, the Commission will be able to ensure that Hu Honua complies with requirements of the project, particularly if the A&R PPA is approved prior to memorializing, *let alone determining the methodology for*, key aspects of the project such as the source of the trees intended for burning or the verification of carbon emission and sequestration efforts, to name just a few. Moreover, there is no evidence in the record as to how the Commission (or HELCO for that matter) could or would respond if the verification analysis reveals that Hu Honua is not in compliance. Without clearly articulated conditions and consequences being included in the A&R PPA, it is unlikely that the Commission (or HELCO) would have the legal authority necessary to bring Hu Honua into compliance. This problem is exacerbated by the complex and opaque web of corporate entities associated with the Hu Honua project, many of which play key roles in the proposed project, yet lack contractual (or other) obligations to the Commission or HELCO that would provide a basis for oversight, regulation, or enforcement upon which the Commission can rely.

**LOL's due process rights will be violated if the A&R PPA is approved without the Commission first definitively determining Hu Honua's obligations related to the A&R PPA, the compliance verification methodology, the mechanism for enforcement, and/or other important outstanding issues.**

The applicants have the burden of proof. After fourteen years, the applicants have yet to show that they will sequester more GHG than they produce. What harm could they have faced if they had simply proposed the protocols and verification processes as part of their filings?

Hu Honua proposes that protocols and verification processes be developed after the Commission approves the PPA and that Life of the Land be excluded from discussing GHG protocols and verifications. This is a clear violation of LOL's due process and constitutional rights.

Pre-approving the PPA while these protocols are uncertain would be creating regulatory and bureaucratic momentum in favor of the project before the Commission can be sure that the parties have complied with their obligation on GHGs. Environmental law generally disfavors that sort of regulatory "lock-in." Life of the Land has a right to object if it turns out that the sequestration protocols do not sufficiently protect the public interest. We have a right to cross-examine witnesses proffering testimony on sequestration protocols and how and who is chosen for GHG sequestration verification.

#### **XIV. CONCLUSION**

LOL asserts that the proposed project fails to meet the minimal level required under each issue in the 2019 Statement of Issues and each issue in the 2021 Statement of Issues. The preponderance of the evidence has established that the Hu Honua project is unnecessary, unreasonable, and not in the public interest due to its unacceptably high economic impacts

including bill increases in a county hard hit with an economic slowdown, its displacement of cheaper and cleaner renewable energy resources, and the significant environmental and public health impacts such as GHG emissions, harmful air emissions, massive freshwater use, harmful wastewater discharges into the ocean, destruction of forest ecosystems and biodiversity, and numerous impacts to the community. Moreover, the Project relies on an inadequate and speculative greenhouse gas analysis utilizing outdated and inappropriate methods and lacks any concrete mechanism for oversight and enforcement. The Project is unprecedented in the level of secrecy it imposes on regulators and reviewers analyzing its proposed operations, has a black box corporate structure that obscures major parts of its operations, and relies extensively on speculative and unsupported claims that amount to nothing more than greenwashing.

In light of the procedural history of the Project, including the highly suspect motivations for HELCO's support of the A&R PPA arising from the confidential mediation of Hu Honua's billion-plus dollar federal lawsuit, the Commission should evaluate the Project with the utmost scrutiny in order to fulfil its duty of regulating in the public interest and ensure that the due process rights of the docket participants, including LOL, are protected and preserved. If the Commission meets this obligation, the A&R PPA should be rejected.

The Commission should reject the A&R PPA.

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing LIFE OF THE LAND'S POST EVIDENTIARY HEARING BRIEF was duly served upon the following parties electronically to the e-mail addresses below pursuant to HAR § 16-601-21(d) as modified by Order No. 37043 Setting Forth Public Utilities Commission Emergency Filing and Service Procedures Related to COVID-19, filed on March 13, 2020.

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DATED: March 29, 2022, Honolulu, Hawaii.

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